TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted]336

FORT SMITH SPELTER COMPANY, PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED JANUARY 26, 1925

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 774

FORT SMITH SPELTER COMPANY, PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX

	Original	Print
Proceedings in supreme court of Arkansas	1	1
Stipulation re transcript of record	1	1
Proceedings before the Corporation Commission	4	3
Petition to establish and enforce rate on natural gas for smelters	4	3
Notices of petition	17	11
Response of Fort Smith Spelter Co.	21	13
Exhibit—Articles of agreement and incorporation of Clear Creek Oil and Gas Co.	31	20
Exhibit—Certificate of incorporation	33	22
Exhibit—Contract between Clear Creek Oil and Gas Co. and D. W. Kerr et al., March 17, 1916	36	23
Testimony of J. F. McGehee	43	29
D. W. Kerr	131	88
E. E. Buck	141	93
W. F. Blocker	146	96
F. H. Fennessey	147	97
R. S. Robertson	149	98
E. G. Hathorn	180	118

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 1, 1924

	Original	Print
Exhibit in Evidence—Order of county court of Crawford County, Arkansas, re petition of Clear Creek Oil and Gas Co. for right to lay lines	198	130
Ordinance No. 1151 of city of Fort Smith, Arkansas	201	132
Ordinance of the city of Van Buren, Arkansas, March 25, 1916	205	134
Letter, Clear Creek Oil and Gas Co. to F. H. Fennessey, March 31, 1916	210	137
Order of Corporation Commission, July 6, 1920	211	138
Supplementary order of Corporation Commission, July 8, 1920	213	139
Supplementary order of Corporation Commission, July 14, 1920	215	140
Separate petition of Fort Smith Spelter Co. for rehearing	218	141
Order denying petition for rehearing	221	143
Order granting appeal	222	143
Motion for appeal	223	144
Record from circuit court of Pulaski County	224	144
Petition for order restraining putting in of rates	224	144
Response	226	146
Order suspending order of Corporation Commission	231	149
Bond on suspension order (omitted in printing)	233	149
Judgment, cause No. 6654	235	150
Motion for appeal	236	150
Order allowing appeal, etc	237	151
Stipulation re transcript of record	238	151
Opinion, McCulloch, J	239	152
Opinion, Humphreys, J. (second appeal)	257	160
Opinion, Hart, J. (third appeal)	261	163
Record from circuit court of Pulaski County, cause No. 7139	270	167
Mandate from supreme court, cause No. 7139	270	167
Request for declaration of law and order overruling same	272	168
Judgment, October 3, 1921	273	169
Judgment, October 10, 1921	275	170
Motion and prayer for appeal	278	172
Order allowing appeal	280	173
Clerk's certificate	281	173
Proceedings in supreme court of Arkansas, cause No. 7853	283	174
Stipulation dismissing appeal of Arkansas Zinc and Smelting Co.	283	174
Record from circuit court of Pulaski County, cause No. 7853	285	174
Mandate from supreme court	285	175
Declarations of law, refused	287	176
Motions for new trial	291	178
Clerk's certificate	296	181
Order setting cause for hearing, cause No. 6654	297	182
Submission of cause, cause No. 6654	297	182
Judgment, cause No. 6654	298	183
Order extending time, cause No. 6654	299	183

	Original	Print
Submission of cause No. 6654	299	183
Order overruling petition for rehearing	299	184
Submission of cause No. 7139	300	184
Judgment, cause No. 7139	300	184
Order dismissing appeal of Arkansas Zinc & Smelting Co. in cause No. 7853	302	185
Order setting cause No. 7853 for hearing	302	186
Submission of cause No. 7853	303	186
Judgment, cause No. 7853	303	186
Order extending time, cause No. 7853	304	187
Submission of petition for rehearing, cause No. 7853	304	187
Order overruling petition for rehearing, cause No. 7853	305	187
Clerk's certificate	306	188
Assignment of errors, cause No. 6654	307	188
Prayer for reversal, cause No. 6654	309	189
Petition for and order allowing writ of error, cause No. 6654	310	189
Bond on writ of error (omitted in printing)	312	190
Writ of error, cause No. 6654	313	190
Certificate of lodgment	315	191
Citation and service (omitted in printing)	316	192
Return to writ of error	317	192

[fol. 1] IN THE

SUPREME COURT OF ARKANSAS

No. 7853

CLEAR CREEK OIL & GAS COMPANY, Appellant,

vs.

FORT SMITH SPELTER COMPANY, Appellee

STIPULATION FOR PRINTING RECORD

To the Clerk:

In the above entitled cause it is mutually agreed between the parties through their attorneys of record that the following shall be included in the transcript of the record to be filed in the Supreme Court of the United States, pursuant to a writ of error allowed in the above entitled cause:

Petition to establish and enforce a rate on natural gas for smelters	P. 166–183,	T. A.
Notice and summons	P. 184–185,	A.
Service of said notice and summons	P. 186,	"
Notice to continue hearing in Little Rock	P. 187–90,	"
Response of Fort Smith Spelter Company	P. 241–255,	"
Articles of Incorporation of Clear Creek Oil & Gas Company	P. 1–7,	"
Contract between Fort Smith Spelter Co. and Clear Creek Oil & Gas Company	P. 8–17,	"
Evidence of J. F. McGehee	P. 2–33,	"
	P. 35–60	
	P. 63–134	
	P. 195–197	
	P. 232–240	
D. W. Kerr's testimony	P. 149–150	
	277–285	
E. E. Buck's testimony	150–151	
	304–307	
W. F. Blocker's testimony	P. 34	
F. E. Fennessey's testimony	P. 61–62	
R. S. Robertson's testimony	P. 151–165	
	167–168	
	201–219	
E. G. Hothorn's testimony	P.	

[fol. 2] It is stipulated that G. S. Gilbertson, Martin Fitzgerald and W. R. Martin testified in substance as follows:

That the cost of producing and delivering gas to the smelters was at no time during the period that gas was furnished to them less

than 6 cents per thousand cubic feet, and the cost thereof ran to as high as 8 cents per thousand cubic feet, and that the Arkansas Zinc & Smelting Corporation at Van Buren was, after the first year of operation paying the Twin City Pipe Line Company the sum of 9 cents per thousand cubic feet for two thirds of its supply of gas, and the testimony of said witneses indicated that the price of gas at South Fort Smith, where the Fort Smith Spelter Company is located, should be 2 cents more than the price of gas at Van Buren.

Petition of the Clear Creek Oil & Gas Co. for right to lay pipe line in County roads	P.	46–49, T. A.
Ordinance by City of Fort Smith to lay and operate system of pipes, etc.	"	86–90
Ordinance by City of Van Buren to same effect	"	91–97
Acceptance of Van Buren Ordinance	"	98
Order of the Commission	"	225–228
Supplementary Order of Commission		229–230
		231–234
Petition for Rehearing		313–316
Denial of Application for Rehearing		235–236
Order Granting Appeal		237–238
Motion for Appeal		318
Petition in Pulaski Circuit Court for Restraining Order		398–400, Tr. B.
Response of Plaintiff		401–407
Order of Circuit Court Suspending Rates till final Hearing		408–409
Bond of Ford Smith Spelter Company		412–413
Judgment of Circuit Court		419–420
Motion for Appeal by Clear Creek Oil & Gas Co.		421
Order of Court		422
Stipulation of Counsel		423
Pages 262-278		
Opinion Ark. Supreme Court, Vol. 153, Pages 172-175		
Opinion in Arkansas Law Reporter		
Judgment of Supreme Court of Arkansas on denying Petition for Rehearing		

[fol. 3] (Signed) Jas. S. Holt and Mehaffy, Donham & Mehaffy, Attorneys for Appellants. (Signed) Hill & Fitzhugh, Attorneys for Appellees.

[fol. 4] BEFORE THE CORPORATION COMMISSION

CLEAR CREEK OIL & GAS COMPANY, Petitioner,

vs.

FORT SMITH SPELTER COMPANY, ARKANSAS ZINC AND SMELTING CORPORATION, ATHLETIC MINING AND SMELTING COMPANY, Respondents

PETITION TO ESTABLISH AND ENFORCE A RATE ON NATURAL GAS FOR SMELTERS—Filed March 17, 1920

Comes the Clear Creek Oil & Gas Company and invokes the authority of the Commission under Section 8 of the Act of April 1st, 1919, being Act number 571, to modify the existing gas rates fixed by private contract between the Petitioner and Respondents and to establish a reasonable rate for the sale of Petitioner's natural gas to the Respondents and all other smelters in lieu of the existing rates, which the Petitioner alleges are unjust, unreasonable, insufficient, and inadequate, and for cause thereof the Petitioner alleges:

That it was duly incorporated under the laws of Arkansas for the purpose of transacting the following business, to-wit:

"For the purpose of sinking wells, boring for, providing and transporting crude oil and natural gas, coal, asphalt and any other minerals which may be found in the development of their property.

"Also to purchase, hold, transfer, convey and lease such real and personal property as the legitimate purposes of the corporation may require.

"Also to borrow money, to issue bonds, and to pledge its property for the security of same, and the entering into of all obligations and contracts essential to the transaction of its affairs or for the purposes of the corporation.

"Also to have and to hold, to enjoy and to exercise all the privileges [fol. 5] and benefits conferred by the laws of the State of Arkansas, upon corporations for manufacturing and other lawful business."

That the Petitioner acquired leases on about 30,000 acres of land for the purpose of drilling for oil and gas and paid $15,000.00 in its stock for said leases and in addition thereto $15,000.00 of stock was subscribed and paid for the purpose of raising funds to drill a test well on the leased area. The result of drilling was the discovery of a gas well at a depth of 2,300 feet on the place of Binks Kibler about seven miles east of Van Buren in Crawford County in November, 1915. The said well had an open flow of 12,000,000 cubic feet per day and rock pressure of 265 pounds to the square inch and in order to secure funds to develop its gas discovery the Petitioner increased its capital stock from $30,000.00 to $50,000.00 and issued $15,000.00 of the increase and sold the same at the price of $5.00 for one of the face value thereof, thereby realizing — $15,000.00 of stock the sum

of $75,000.00, making the total investment in stock $105,000.00 evidenced by capitalization of $45,000.00. At the time of said discovery of the Kibler gas field there was little gas used for fuel purposes in the City of Fort Smith, the industries therein operating with coal as fuel, the commercial houses and residences being supplied with gas for fuel, but not the industries. The petitioner desired to bring industries to Ft. Smith and also to supply the existing industries therein with gas as fuel. The Petitioner advertised for industries to come to Fort Smith and that it would furnish the same with gas for fuel and sought to attract capital to Fort Smith to make investment in factories which would use gas as fuel. Resulting from said efforts was the procurement by the Petitioner of the Three Respondents to establish industires to use gas as fuel to be furnished by the Petitioner. On the 7th of March, 1916, the Petitioner entered into an agreement with D. W. Kerr and H. S. Buck by the terms of which the said Kerr and Buck were to organize a corporation which would take over said contract and would erect a smelter to be served by the Petitioner with gas in the vicinity of Fort Smith and the [fol. 6] Petitioner was to furnish it gas to the extent of its capacity, which is now and has been since its construction 3,800,000 cubic feet per day. By the terms of this contract the Petitioner gave this smelter the first call on its gas to the extent of its full requirement. The Fort Smith Spelter Company is the company operating under said contract and it erected a smelter at South Fort Smith. On the — day of May, 1916, the Petitioner entered into a contract with L. Vogelstein and Company by which it agreed in connection with the Wild Cat Oil and Gas Company to furnish natural gas to a smelter to be erected by the corporation to which said contract was to be assigned. The Petitioner agreed to give said corporation a second call upon the gas to the extent of its requirement under said contract, which is approximately 1,500,000 cubic feet per day. The Arkansas Zinc and Smelting Corporation erected a smelter at Van Buren and succeeded to the rights of Vogelstein and Company in said contract. Subsequently thereto the Petitioner entered into a contract with Charles T. Orr by which it agreed to furnish him with gas for a smelter to be erected to the extent of its requirement, which has been approximately 3,500,000 cubic feet per day.

That said contract has been assigned to Athletic Mining and Smelting Corporation, which has erected a smelter at Fort Smith and is operating under said contract. Subsequently thereto the Petitioner entered into contracts with parties who organized corporations which have erected two glass factories in the City of Fort Smith, the Model Window Glass Company and the Radiant Glass Company, each of which have erected factories to use the gas of Petitioner as fuel therein and they have respectively the fourth and fifth call upon the Petitioner's gas according to the terms of their contracts and according to the terms of the contracts with said smelters. The combined requirements of said glass factories is 1,500,000 cubic feet per day.

Subsequent thereto the Petitioner, having surplus of gas over the requirements of its five customers, took on many industries

[fol. 7] in Fort Smith and South Fort Smith including the City Water Works, Equitable Powder Company, Best-Clymer Manufacturing Company, and other factories, having as many as nineteen industries on its line. It also supplied and is now supplying domestic consumers in South Fort Smith and in the Kibler field.

In order to bring its gas from the wells in Crawford County to Fort Smith and vicinity the petitioner constructed a ten-inch pipe line from the Kibler field through the cities of Van Buren and Fort Smith to South Fort Smith, a distance of twenty miles, and said pipe line and its laterals cost $165,000.00.

In the years 1916 and 1917 the Petitioner drilled thirteen wells, three of which were dry holes and the drilling expense of the Petitioner was $81,000.00. The expense of carrying leases on the large area leased was great and in the year 1917 amounted to over $25,000.00. After the explorations by Petitioner and other companies, it was determined that the greater part of the area leased was unproductive and the leases were surrendered in all the unproductive area and the Petitioner retained only its leases in the Kibler field on about 8,000 acres and thereby reduced its rental charges to about $8,000.00 per year. In order to meet its great expense and construct its pipe line the Petitioner was compelled to borrow money. It borrowed $45,000.00 from the Arkansas Zinc and Smelting Corporation to aid in the construction of its pipe line, which it has repaid in gas. It issued bonds secured by a mortgage upon its property and obtained a large sum therefrom which was used to develop the field and construct the pipe line. For reasons hereinafter stated in 1918 the Petitioner was compelled to suspend development and apply all its receipts over its operating expenses toward its debts in order to avoid foreclosure of the mortgage and judgments against it.

That its indebtedness has been large- reduced and the approximate [fol. 8] amount it owed on March the 1st, 1920, was as follows:

Accounts Payable, open accounts	$7,253.74
Bills Payable, Notes at Bank	16,000.00
Customers' Deposits on Meters	914.50
Total	$24,168.24
Mortgage indebtedness on bonds outstanding	50,700.00
Total indebtedness	$74,868.24

That under the Act of May the 2nd, 1905, the Petitioner was entitled with the consent of the authorities thereof to construct and maintain its pipe line along and under the public highways and along and under the streets of cities and towns. Your Petitioner filed with the County Court of Crawford County its petition setting forth the purpose of its incorporation and the fact that it was constructing a pipe line from its wells in Crawford County to the Cities of Fort Smith and Van Buren and prayed for consent to use the public highways of Crawford County in which to construct and maintain its pipe line, which consent was granted by the County Court. Sim-

ilar proceedings were had in Sebastian County. Your Petitioner applied for and was granted franchises in the Cities of Fort Smith and Van Buren to operate as a public utility therein in the distribution and sale of natural gas under the regulations prescribed in said franchises. The said franchises gave Petitioner the consent of the cities for it to use the streets of said cities in which to construct and maintain its said pipe lines.

That the pipe lines and laterals of Petitioner have been constructed under the aforesaid authority through and under the highways of Crawford and Sebastian Counties and through and under the streets of the Cities of Fort Smith and Van Buren.

That the Petitioner is required to make returns to the Tax Commission and the said Tax Commission assesses its property for taxation.

That this Commission required the Petitioner to file with it its Schedule of Rates, which your Petitioner did on July the 29th, 1919, when it filed its schedule of its domestic, industrial, glass factory and [fol. 9] smelter rates.

That until the Petitioner's gas supply declined in the summer of 1918 to such an extent that it could not furnish gas to other than its five contract customers it was seeking to supply all industries which would use its gas for fuel and had at that time before it began cutting off its customers nineteen industries on its line as well as domestic customers in Kibler field and South Fort Smith, and has a total of 160 domestic customers in said places including one domestic customer in the City of Fort Smith. This Petitioner, while never seeking domestic customers outside of South Forth Smith, has been until prevented by a shortage of gas actually seeking to serve all industries which its gas supply would permit it to serve in the Cities of Fort Smith and Van Buren and is and has been a public service corporation, subject to the regulating power of this Commission since this Commission was created. The Petitioner alleges that its customers are likewise subject to the regulating power of this Commission as well as all customers of other public service corporations.

That at the time the Petitioner sought to bring industries to Fort Smith coal was the fuel in common use in factories and it was, owing to the location of Fort Smith near the coal field, a cheap fuel. At that time natural gas was plentiful in Oklahoma and sold cheaply. The Petitioner in order to induce industries to come to Fort Smith had to make the price as low as the prices prevailing in Oklahoma and have the same less than coal would cost as fuel.

That in the summer of 1916 when these industries were located in Fort Smith mine run coal was selling at the mines near Fort Smith at prices ranging from $1.75 to $1.85 per ton. The prices of coal at the mines by the summer of 1919 had risen to $3.45 per ton of mine run coal and at the present time, March, 1920, the prevailing price at the mine is $3.65 and the price delivered in Fort Smith is $4.95. The practical equivalent of a ton of mine run coal is 20,000 cubic feet of Kibler gas. At 4¢ per thousand cubic feet the gas equivalent of a ton of mine run coal would be $1.02 and at 8¢ the gas equivalent would be $2.04 and at 10¢ the gas equivalent would be $2.55, whereas, [fol. 10] at the present time a ton of coal delivered at Fort Smith

would cost $4.95. The Petitioner alleges that the price of natural gas as fuel in Oklahoma has increased and is now not less than 12¢ per thousand cubic feet, said price being fixed by orders of the Corporation Commission of Oklahoma.

That in 1916 when the Petitioner contracted with the Respondents to install industries in Fort Smith and take its gas the price of 4¢ per thousand cubic feet was agreed upon and was so fixed in the contracts between the Petitioner and each of the Respondents and the glass factories referred to. While this was an exceedingly advantageous price to the Respondents it was, in view of the competitive prices in Oklahoma and the low price of coal as fuel, a reasonable rate and in view of the then cost of producing gas it appeared that it would be a compensatory rate for this reason, to-wit: The Petitioner's discovery well produced 12,000,000 cubic feet of gas, open flow, per day and cost less than $6,000 to drill, and that was the only information as to the cost of gas in said field before the Petitioner at the time it fixed the price at 4¢ per thousand cubic feet. Within seventeen months after the Respondents and other companies began operating in the Kibler field two other pipe lines were constructed therefrom delivering gas to Van Buren and Fort Smith and by the end of 1917 the total consumption of gas from said field was 18,000,000 cubic feet per day. The result of such operation was to rapidly deplete the volume of gas in all the wells in said field and diminish the rock pressure, which is the natural force impelling the gas. In 1918 when the Petitioner ceased development the cost of drilling has increased to about $7,500.00 per well and the amounts produced in good wells were not over 2,500,000 cubic feet of open flow, thereby requiring at least five wells to produce 12,500,000 cubic feet of gas at a cost of not less than $37,500.00, as against the initial cost of less than $6,000.00 to produce an equal quantity of gas. The gas producing sand in the Kibler field is soft and drainage through each well is over quite a large area and constant drilling was required to [fol. 11] prevent the wells of the competitors draining gas from the land leased by the Petitioner. During 1918 the Petitioner brought the situation of affairs to the attention of the Respondents and sought an increase in the price of its gas so that it could drill further wells and thereby to secure gas for its customers and protect its leases, but was unable to obtain any increase of price and on account thereof was unable to do further development and was required to apply all of its receipts over its operating expenses to the payment of its debts in order to avoid bankruptcy. In the summer of 1918 the supply of gas of the Petitioner was insufficient to furnish all of its customers and pursuant to its contract obligations it notified all not in the priority list to cease using its gas and with the exception of the City Water Works and a few other who were protected by injunctions it surrendered all of its other customers and its quantity still being insufficient to supply its priority customers it notified the glass factories to cease using its gas and finally notified the Athletic Mining and Smelting Company to cease using its gas so that the priorities of the Fort Smith Spelter Company and Arkansas Zinc and Smelting Corporation should be preserved. The glass companies and

Athletic Mining and Smelting Company obtained temporary injunctions against the Petitioner cutting off their supply of gas and the Fuel Administration of the United States took charge of the gas distribution October 1st, 1918, and continued until February 1st, 1919. During this period the contract priorities were abolished and war priorities established, and the Petitioner was unable during said period, owing to said injunctions and the rulings of the Fuel Administration, to carry out its contract priorities and was unable to cut off its consumers and was thereby forced to deliver to consumers on its line more than 20 per cent of its daily open flow.

That the Petitioner caused its five customers to be made parties to the said injunction suits then pending against it and the Fort Smith Spelter Company filed a cross-complaint against all of them asserting its priority and the glass companies asserted that the priorities in the contracts were void as against public policy and prayed an equal distribution of the Petitioner's gas.

[fol. 12] That the physical situation of the glass companies and Fort Smith Spelter Company and Athletic Mining and Smelting Company were such that the equal right to the Petitioner's gas would operate as a preference to the glass companies and would deprive the smelters of their contract priority and would result in the closing of the Fort Smith Spelter Company, the Athletic Mining and Smelting Company having another partial source of supply.

That said suits went to trial in the Chancery Court on February the 6th, 1918, and were terminated by a dismissal without prejudice on February the 7th, 1919, pursuant to an agreement reached as hereinafter stated. In February, 1918, the Crowe Oil and Gas Company drilled a well south of the developed Kibler field and produced an open flow of gas of 6,500,000 cubic feet and with a rock pressure of 285 pounds to the square inch. The rock pressure in the Kibler field was then less than 150 pounds to the square inch and this well indicated that another gas producing sand had been discovered. The Petitioner then drilled a well, the first it had drilled in more than a year, in the same area, and in January, 1919, produced a well with 7,100,000 cubic feet open flow and with a rock pressure of 285 pounds to the square inch, thereby confirming the fact that a new gas bearing sand was discovered and this has since been called the Williams field. G. T. Cazort owned 160 acres immediately adjacent to these two wells and was desirous of drilling three wells thereupon and selling his output at the wells and offered it to the Petitioner at 6¢ per thousand cubic feet at the well. He was offered said price by competitors of the Petitioner but preferred dealing with Petitioner owing to its larger pipe line capacity. Thereupon the Petitioner submitted said proposition of Cazort to the Respondents and offered to take this Cazort gas if the Respondents would increase their price to 8¢ but the Respondents failed to do anything. The Petitioner realized that 8¢ was an insufficient price for gas for the smelters but believed that such price would enable it to pay its creditors and possibly save some of the investment of its stockholders.

[fol. 13] That said price was insufficient at that time and much

less sufficient at this time to pay the costs of the production of gas and any return to the stockholders.

That the Wild Cat Oil & Gas Company is operating similarly to this Petitioner in the Kibler field and its costs are substantially similar in all respects to that of the Petitioner and it has had a careful estimate of its cost of delivering gas prepared for the six months ending April the 30th, 1919, and found the same to be 8.277 per thousand cubic feet and this did not include any interest on investment or amortization of capital.

That during the trial of the aforesaid suit the Petitioner made a proposition to all the parties to settle the litigation and the controversies between said parties over the distribution of Petitioner's gas.

That its proposition was to acquire the Cazort gas and to drill four wells of its own, thereby producing a sufficient quantity of gas to supply the requirements of all of said parties and not change the priorities of any of them except the Athletic Mining and Smelting Company (which had another source of supply) priority should be limited to 1,500,000 cubic feet per day over the glass factories, and the glass factories were to pay 10¢ and the smelters 8¢ per thousand cubic feet for gas when the quantities to meet their requirements were furnished. This proposition was accepted on condition that the Arkansas Zinc and Smelting Corporation, which was not represented in the negotiations, likewise agree to pay 8¢ per thousand cubic feet for its gas. The Arkansas Zinc and Smelting Corporation did agree to pay the said 8¢ and the Petitioner made the contract with Cazort as outlined and drilled the four wells proposed by it and produced the quantities required by said five customers and has a surplus.

That the Respondents repudiated said agreement after the Petitioner had produced the quantities of gas required of it and the Petitioner sued them for the gas furnished them at the rate of 8¢ [fol. 14] after the quantities were produced and they (except the Athletic Mining and Smelting Company) contended in said litigation that the contract had been accepted conditionally and that the conditions, the principal one which they claimed to have existed, was that the contracts should be reduced to writing and signed by the parties before being effective, had not been complied with. The United States District Court in which said suit was tried directed a verdict against the Petitioner on the ground that the agreement as shown in its testimony contemplated that the agreement should be in writing before it became effective and said decision left in force the original contract rates of 4¢ per thousand cubic feet.

That the Petitioner has appealed from said decision and insists that it has a valid contract with the Respondents to pay it 8¢ for the gas it furnished them since April 1st, 1919, and Petitioner alleges that it will continue to insist upon said contract price up to the time that the same may be modified or changed by this Commission and will thereafter demand such price as may be fixed by this Commission after a full and complete hearing thereof whether said price be higher or lower than the contract price existing.

The Petitioner alleges that the contract price of 8¢ (and if it is in error in maintaining that the contract price is 8¢ and that it is,

in fact, only 4¢ then the following allegations have double force as applied to the contract price of 4¢) is unjust, unreasonable, insufficient, inadequate, and discriminatory.

That the contract rate of 8¢ is unjust in that the gas is being served to the Respondent at less than the cost of production and will lead to the inevitable bankruptcy of the Petitioner and it is unjust from the further fact that it enables the Respondents to make excessive profits on their investments without permitting the Petitioner to make any return upon its investment and will ultimately cause it to lose all of the money which it has invested in the natural gas industry.

[fol. 15] That said rate is unreasonable in that it prevents the Petitioner from developing its leases and thereby enables its competitors to drain its lease holds of the gas thereunder to the injustice of its lessors as well as itself.

That the said rate is unreasonable in that competing rates in both coal and gas as fuel are much higher than said rate.

That said rate is discriminatory in that it prevents development of the field and prevents the Petitioner obtaining gas for sale to other industries who seek to use it, and confines its uses to those now connected with its lines, because of the insufficiency of its supply to continue to furnish them and also other customers without additional drilling, which it is unable to do and pay its debts.

That the rates fixed in said contracts whether considered as 8¢ or 4¢ are wholly inadequate and insufficient to pay the cost of producing the gas, whereas, the Petitioner is entitled to a rate which will pay the cost of production of gas and also a profit on the investment of it in the service.

That said rates are an injustice to the public as well as to the Petitioner in that they stifle the development of the field and the production of gas and prevent the public from having the benefit of a larger production of gas in the Williams field as fuel in the factories and industries of Fort Smith and Van Buren.

Wherefore, your Petitioner prays that after due notice to the Respondents and after full and complete hearing this Commission declare the contract rate of 8¢ (4¢, if it is found as a matter of fact that 4¢ is the contract price) to be unjust, unreasonable, insufficient, inadequate, and discriminatory. Your Petitioner prays that this Commission establish and enforce a rate for smelters to pay for the use of natural gas produced by Petitioner. The Petitioner alleges that 10¢ per thousand cubic feet is the lowest rate which would be reasonable.

The Petitioner alleges that in time it will be required not only to [fol. 16] do additional drilling but to install compressor stations at great expense to deliver the gas to the industries and when these additional expenditures are incurred it will be necessary in order to meet the increased cost thereof to increase the rate over 10¢ per thousand cubic feet and your Petitioner prays that after fixing the rate that the Commission retain jurisdiction so that it may adjust it from time to time to make it reasonable and compensatory and adequate to serve the public necessities and to make it adequate to meet the

increased cost of the production of gas and to enable the Petitioner to receive some profit from its investment.

Your Petitioner prays that proper orders be made for the enforcement of such rate as may be established by it and for all other relief which the Commission may find the Petitioner entitled to receive.

Hill & Fitzhugh, Attorneys for Petitioner.

Jurat showing the foregoing was duly sworn to by J. F. McGehee omitted in printing.

[File endorsement omitted.] (Tr., 166-183.)

[fol. 17] BEFORE THE CORPORATION COMMISSION

[Title omitted]

NOTICE OF PETITION

To the Fort Smith Spelter Company, Arkansas Zinc and Smelting Corporation, Athletic Mining and Smelting Company, the above-named respondents:

You and each of you are hereby notified that the Clear Creek Oil and Gas Company has this day filed with the Arkansas Corporation Commission a petition against you praying that said Commission take jurisdiction under section 8 of Act number 571 of the General Assembly of 1919, approved April the 1st, 1919, of the gas rate existing between it and each of you and that the Commission declare said rate, which it alleges to be a contract rate of 8¢ per thousand cubic feet, be declared unjust, unreasonable, insufficient, discriminatory and inadequate, and that the Commission establish in lieu thereof a reasonable, just, sufficient, and adequate rate not less than 10¢ per thousand cubic feet, and that the Commission retain jurisdiction to make further orders which may be just in the premises.

The said petition sets forth at length the claims of the Petitioner in the premises and asks the Commission after reasonable notice to give a full and complete hearing of the matters alleged therein. And you are, therefore, by order of the Commission hereby notified of the filing of said petition and in brief the substance thereof and notified that the Commission has set down said petition for a full and complete hearing to be begun at Fort Smith, Arkansas, at 9:30 o'clock on the 19th day of April, 1920.

You are, therefore, summoned to appear and answer said petition on or before the day mentioned for the hearing thereof.

This notice and summons is issued by order of the Commission.

In testimony whereof, I have hereunto set my hand as Secretary of said Commission and affixed the seal thereto this 25th day of March.

(Signed) Guy A. Freeling, Secretary of the Arkansas Corporation Commission. (Tr. 184-185.)

[fol. 18] STATE OF ARKANSAS,
County of Sebastian, ss:

I hereby certify that I served copies of the above and foregoing notice and summons in Sebastian County, Arkansas, on March 30th, 1920, upon the Fort Smith Spelter Company, the Arkansas Zinc & Smelting Corporation and the Athletic Mining & Smelting Company as follows, to-wit: By delivering a true and perfect copy of the same to Earl E. Buck, Vice President and General Manager of the Fort Smith Spelter Company, and a true and perfect copy to Robert L. Green, General Manager of the Arkansas Zinc & Smelting Corporation and a true and perfect copy to A. P. Schonaerts, General Manager of the Athletic Mining & Smelting Company.

Given under my hand this the 31st day of March, 1920.
Claude Thompson, Sheriff of Sebastian County, by A. J. Berry, D. S. (Tr., 186.)

Received April 1, 1920. Arkansas Corporation Commission.

[fol. 19] ARKANSAS CORPORATION COMMISSION

[Title omitted]

NOTICE

Little Rock, April 23, 1920.

To all concerned:

Notice is hereby given that the above styled case has been reset and same will be heard in the offices of the Arkansas Corporation Commission, in the City of Little Rock, Arkansas, New State Capital Building, at 9:30 A. M., on Monday, May 3, 1920, at which time all interest- parties will be given an opportunity to be heard.

Witness my hand as Secretary and Seal of the Commission, this the 23rd day of April, 1920.
By the Commission:

Guy A. Freeling, Secretary.

Clear Creek Oil & Gas Co., Ft. Smith, Ark. Hill & Fitzhugh, Ft. Smith, Ark. Falconer & Brown, Ft. Smith, Ark. Daily & Woods, Ft. Smith, Ark. Mehaffy, Donham & Mehaffy, Little Rock, Ark. Jas. B. McDonough, Fort Smith, Ark. Ft. Smith Smelter Co., Ft. Smith, Ark. Athletic Mining & Smelting Company, Ft. Smith, Ark. Arkansas Zinc & Smelter Corporation, Ft. Smith, Ark. (Tr. 187-188.)

[fol. 20] ARKANSAS CORPORATION COMMISSION

[Title omitted]

NOTICE

Little Rock, April 29, 1920.

To all concerned:

Notice is hereby given that the above styled case has been reset and same will be heard at the offices of the Arkansas Corporation Commission, in the City of Little Rock, Arkansas, New State Capitol Building, at 9:30 A. M., on Tuesday, May 11, 1920, at which time all interested parties will be given an opportunity to be heard.

Witness my hand as Secretary and Seal of the Commission, this the 29th day of April, 1920.

By the Commission:

Guy A. Freeling, Secretary.

cc Clear Creek Oil & Gas Co., Ft. Smith, Ark. Hill & Fitzhugh, Ft. Smith, Ark. Falconer & Brown, Ft. Smith, Ark. Daily & Woods, Ft. Smith, Ark. Mehaffy, Donham & Mehaffy, Little Rock, Ark. Jas. B. McDonough, Fort Smith, Ark. Ft. Smith Smelter Co., Ft. Smith, Ark. Athletic Mining & Smelting Co., Ft. Smith, Ark. Arkansas Zinc & Smelter Corporation, Ft. Smith, Ark. (Tr. 189-190.)

[fol. 21] BEFORE THE ARKANSAS CORPORATION COMMISSION

[Title omitted]

RESPONSE OF THE FORT SMITH SPELTER CO.—Filed April 3, 1920

This defendant denies that the rates existing fixed by contract between the petitioner and this respondent are unjust, unreasonable, insufficient or inadequate.

As to the allegations in the petition as to amounts expended and work done by the petitioner, this respondent has no knowledge or information sufficient to form a belief, and hence denies the same.

It has no knowledge or information sufficient to form a belief as to the indebtedness of the petitioner, and hence denies the allegations with reference thereto.

This petitioner denies that it and other customers are subject to the regulating power of this commission as well as all other customers of other public service corporations.

This respondent says that it has no knowledge or information sufficient to form a belief as to the comparative value or price of coal and gas as alleged in the petition, and hence denies the same.

This respondent says that it has no knowledge or information sufficient to form a belief as to the price of gas in Oklahoma, and hence denies petitioner's allegation.

This respondent denies that the result of operation mentioned in plaintiff's petition was to rapidly deplete the volume of gas in all the wells in said field and diminish the rock pressure, which is the natural force impelling the gas.

Respondent says that it does not know and has no knowledge or information sufficient to form a belief about the cost of drilling alleged in the petition, and hence denies these allegations.

Respondent denies that the petitioner was unable to do further development and was required to apply all of its receipts over its [fol. 22] operating expenses to the payment of its debts in order to avoid bankruptcy.

This respondent denies that the petitioner realized that 8¢ was an insufficient price for gas, and denies that it believed that such price would only enable it to pay its creditors and possibly save some of the investment of its stockholders.

Denies that said price was insufficient at that time and much less sufficient at this time to pay the costs of the production of gas and any return to the stockholders.

This respondent denies that the Wild Cat Oil & Gas Co. produced gas at less cost than petitioner, and denies that the cost to said Wild Cat Co. is 8.277 per thousand cubic feet, and denies that this did not include any interest on the investment or amortization of capital.

This respondent denies that the proposition alleged to have been made by petitioner at the close of the chancery suit was accepted on condition that the Arkansas Zinc & Smelting Corporation would agree to pay 8¢ per thousand cubic feet; denies that any such proposition as suggested by petitioner was made at any time; denies that this respondent or any other Spelter Company agreed to pay 8¢, and alleges that this very question was recently determined in the Federal Court at Fort Smith, the petitioner bringing a suit alleging it had made a contract for 8¢. The entire question was investigated, all the testimony taken, and the court promptly decided that petitioner had not made any such contract as it now pretends to have made.

This respondent denies that it repudiated said agreement at any time; it admits that petitioner sued it for 8¢ and admits that the United States Court directed a verdict against he petitioner, and admits that one of the things the Court said was "that the testimony showed conclusively that the agreement was not to be binding until it was written," but there were several other conditions which were alleged by the defendants in that suit, one of which is the respondent here, and that the proof showed that as to each and all of these [fol. 23] conditions there was a failure on the part of the petitioner to conform or comply with it.

Respondent admits that the petitioner has appealed the case to the Court of Appeals, and admits that it is contending in that case that it has a right to make a private contract, and contending in this petition that it has no such right; that the other suit was brought

and tried in the Federal Court long before the filing of this petition, and as alleged by petitioner, appeal taken, the plaintiff still contending that it has this contract and contending that it has a right to enforce this contract, and if that is true, it could have no standing before this commission. If its allegations in the complaint in the Federal Court are true, and they are alleged in this petition to be true, then the other allegations in this petition are false in that they contradict the allegations and contentions made in the case in the Federal Court.

This respondent denies that the contract price of 4¢ is unjust, unreasonable, insufficient, inadequate and discriminatory, but it alleges the truth to be as stated in the first part of petitioner's petition; that this respondent was induced to go to Fort Smith, build its smelter there, incur large expense which it would not have done but for the contract that petitioner offered it, and which it accepted, and that this contract was made at a time when the petitioner was not a public service corporation and did not claim to be a public service corporation; did not own any pipe lines, was not furnishing any customers but these smelters and expressly agreed with them to furnish the gas required by them at the price mentioned in the contract and was not serving the public at all, and this contract was the inducement for this respondent to spend large sums of money in establishing its industry at Fort Smith, and as already said, at a time when there was no question about the parties having the right to enter into this contract.

[fol. 24] This respondent admits that a rate of 8¢ would be unjust, but not for the reason given by petitioner; that it would not be less than the cost of production and it will not lead to bankruptcy of the petitioner, and it is not unjust from the further fact that it enables respondent to make excessive profits on their investment without permitting the petitioner to make any return upon its investment; and it denies that it will ultimately cause it to lose all of the money which it has invested in the natural gas industry.

It denies that said rate is unreasonable in that it prevents the petitioner from developing its leases and thereby enables its competitors to drain its lease holds of the gas thereunder to the injustice of its lessors as well as itself.

It denies that the rate is unreasonable in that competing rates in both coal and gas as fuel are much higher than said rate.

It denies that said rate is discriminatory in that it prevents development of the field and prevents the petitioner obtaining gas for sale to other industries who seek to use it, and confines its use to those now connected with its lines, because of the insufficiency of its supply to continue to furnish them and also other customers without additional drilling, and pay its debts.

Denies that the rate fixed in the contract, whether considered as 8¢ or 4¢ is wholly inadequate and insufficient to pay the cost of producing the gas; and denies that the petitioner is entitled to a rate which will pay the cost of production of gas and also a profit on the investment of it in the service.

Denies that the rates are an injustice to the public as well as to

the petitioner, in that they stifle the development of the field and the production of gas and prevent the public from having the benefit of a larger production of gas in the Williams field as fuel in the factories and industries of Fort Smith and Van Buren.

This respondent denies that 10¢ per thousand cubic feet is the lowest rate which would be reasonable.

This respondent does not know and has no knowledge or information sufficient to form a belief as to whether in time petitioner will [fol. 25] be required not only to do additional drilling but to install compressor stations at great expense to deliver gas to the industries, and hence denies the same.

Denies that when these additional expenditures are incurred, it will be necessary in order to meet the increased cost thereof, to increase the rate over 10¢ per thousand cubic feet.

And for further response, respondent says:

That on the 17th day of March, 1916, the Clear Creek Oil & Gas Co., party of the first part, and D. W. Kerr and H. S. Buck, parties of the second part, entered into a written contract, a copy of which is hereto attached and made a part hereof as fully as if set out at length in this response; that by the terms of said contract, party of the first part, and parties of the second part, included the successors and assigns of parties of the first and second part.

That almost immediately after the execution of said contract, said contract was duly assigned by said D. W. Kerr and H. S. Buck to the respondent Fort Smith Spelter Co., and that said Fort Smith Spelter Co. thereupon succeeded to all the rights and incurred all of the liabilities imposed by said contract; that said Fort Smith Spelter Co. has performed each and every one of the conditions, agreements and covenants contained in said contract on its part to be performed.

That said contract is a valid, binding, existing contract, and is at the present time in full force and effect, and that the Clear Creek Oil & Gas Co., since the 17 day of March, 1916, down until the present time, has been and is continuing to furnish gas to the Fort Smith Spelter Co., pursuant to the terms of said contract.

Respondent further says that it is recited in said contract as follows:

"Whereas, said second parties intend primarily to construct a smelting plant for the smelting of zinc and other ores at Fort Smith, in the State of Arkansas; and

Whereas, one of the inducements for the location of said plant upon said lands is the procurement of natural gas from the said first party, during the life of the field, and the said first party desires to sell, and the said second party desires to purchase a supply of natural gas for use in and about the construction, operation and maintenance of said smelting plant; or, for other future manufacturing uses of said parties of the second part."

[fol. 26] It is expressly agreed in said contract among other things:

"Second. Said second parties to show their good faith in the fulfillment of this contract, are to commence the construction of

said smelting plant within fifteen (15) days after the execution and delivery of this contract, and to prosecute said construction with due diligence and dispatch, and party of the first part agrees to begin the delivery of gas, according to the terms of this contract, if so required by parties of the second part, not later than ninety (90) days from the execution of this contract."

That said covenant in said contract was fully performed by said Fort Smith Spelter Co.; that said smeltering plant was erected as provided therein, and that said smelter would not have been erected by this respondent except for the provision contained in said contract, including the agreement on the behalf of petitioner to furnish gas to respondent for 4¢ during the life of the Kibler gas field as defined in said contract.

That it was further agreed in said contract as follows:

"Sixth. Said second parties agree to pay for all gas delivered under this contract at the rate of four cents (4¢) for each thousand cubic feet, upon the basis of an eight ounce pressure, and the time of payment for gas used during any month shall be on the 15th of the month following that in which the gas is consumed."

That it was further agreed in said contract as follows:

"Seventh. Said first party agrees to furnish to said second parties, whatever amount of gas may be required and requested by the second parties under this contract, beginning ninety (90) days after the execution of this contract, until the expiration of one hundred sixty (160) days from the execution of this contract. It further agrees to furnish to the second parties, and second parties agree to accept hereunder, beginning one hundred and sixty (160) days from the date of the execution of this contract not less than sixty million (60,000,000) cubic feet as a minimum of gas, for each thirty (30) days thereafter, until September 1, 1918—at which time the accepting of any exact stipulated quantity by the second parties, shall not be required; and it is agreed that the second parties shall have the right to demand and receive from said first party, any quantity up to and including one hundred fifty million (150,000,000) cubic feet for each thirty (30) days, and to be supplied continuously, as required by the second parties; and it is further agreed that if the second parties' needs shall increase so as to require additional gas to that hereinbefore provided, said second parties shall give one hundred twenty (120) days' notice, in writing to the first party, of the additional quantity of gas necessary, and the first party agrees and promises that within one hundred twenty (120) days after receiving said notice, it will furnish to said second parties, additional quantities of gas, as required by said notice,—except as provided in Article 12, relative to the life of the field—provided, that in no event shall the first party be required to furnish more than three hundred sixty million (360,000,000) cubic feet,

as a minimum, for each thirty (30) days thereafter, during the life of the contract."

That it was further agreed in said contract as follows:

[fol. 27] "Tenth. It is expressly understood and agreed, and notice to third parties hereby is given accordingly, that said second parties shall have first call upon the gas supplies of said first party now being, or which may hereafter be, obtained from any land within the counties hereinbefore mentioned, or other territory which may be acquired by first party; and that the right of said second party to receive and take or to be supplied with the gas hereunder, from said territory is prior and superior to any contract or agreement made or which may be made by said first party, for the furnishing of gas to others, from said territory. Said second parties agree to take their entire supply of gas from first party so long as the latter is able to furnish it, and in the event party of the first part is ever unable to supply the entire needs of the second parties, then second parties shall take from first party all the gas they may need which party of the first part is able to supply."

And it was further agreed in said contract, as follows:

"Eleventh. Inasmuch as the general supply of natural gas is of uncertain duration, and the construction, maintenance and successful operation of said smelting plant will require a heavy investment of capital and an abundant and staple supply of natural gas; and to the end that the supply now being, or which may hereafter be obtained by said first party from the territory aforesaid may be conserved for the purpose of this contract, and as one of the inducements and considerations for the location of said smelter, said first party expressly covenants and agrees to and with said second parties, that so long as this contract remains in force, said first party will not, either directly or indirectly, supply or furnish natural gas, from the territory covered by this contract, to consumers or others, in an amount exceeding in the aggregate fifteen per cent (15%) open flow test of the total volume of gas being produced or procured, or both, from time to time, by said first party, from the territory comprising the source of supply hereunder. If however, it can be demonstrated and shown to the reasonable satisfaction of second parties, that twenty per cent (20%) open flow will not endanger or shorten the life of the field, then, in such event, a twenty per cent (20%) open flow will be satisfactory to both parties."

And it was further agreed in said contract, as follows:

"Twelfth. This contract shall be and remain in force so long as gas in sufficient quantities to comply with the terms of this contract can be procured from the territory hereinbefore mentioned, now held by the first party, or which may hereafter be held or controlled, directly or indirectly, by it, and which may be produced by reasonably diligent development and operation of lands within the

territory above described; provided, that in case the supply of gas hereunder at any time, permanently or temporarily, fails or falls below the required quantity to be furnished, as provided by Article 7 above, the second parties shall have the right, at their election, to continue this contract in force and to continue to take and receive hereunder, such lesser quantities of gas as the first party may be able to supply, in which event, and if necessary, the fifteen per cent or twenty per cent open flow restriction shall be temporarily removed, and permanently, if proven necessary to insure a sufficient and continuous supply of gas to second parties."

That it was further agreed in said contract as follows:

"Thirteenth. This contract is conditional on second parties securing a satisfactory site, with switches and tracks, free and without cost to second parties."

[fol. 28] That said site was secured by parties of the first part for parties of the second part, and that parties of the second part smelter was located thereon; that said site is not within the corporate limits of either the city of Fort Smith or the city of Van Buren.

For further response, respondent says that at the time of the execution of said contract, the petitioner had one gas well and a number of leases upon territory supposed to contain gas; that at that time it had no pipe line; that at that time it was not furnishing gas to consumers or others, and that at the time of the execution of said conract, it had not agreed to furnish gas to any other persons or corporations; that at the time of the execution of said contract said petitioner had no franchise either in the city of Fort Smith or in the city of Van Buren, or any other city or town, and had applied for no franchise in either of said towns; that at the time of the execution of said contract, said petitioner had not applied to the County Court of either Sebastian or Crawford county with reference to the laying of any pipe line; that the physical situation of the smelter and its location on the site procured by party of the first part was such that petitioner could supply this respondent with gas without constructing any pipe line through the city of Fort Smith or the city of Van Buren.

That the relations of the parties were such at the time of the execution of said contract, that said contract was purely private in its said nature and was not subject to any regulation whatsoever; that any law or order passed or promugated subsequent to the making of said contract would deprive this respondent of its property without due process of law, and would be violative of and contrary to Section 1, Article 14 of the Constitution of the United States. It would also impair the obligation of the contract above set out, and would therefore be violative of and contrary to Section 10, Article 1 of the Constitution of the United States, and of Article 2, Section 17 of the [fol. 29] Constitution of the State of Arkansas; that any order of this commission attempting to fix rates in this case would be violative of Section 10, Article 17 of the Constitution of the State of Arkansas;

that this section authorizes the Legislature to prevent unjust, discriminatory and excessive charges by railroads, canals and turnpike companies, and authorizes the creation of such offices and commissions and vests in them such authority as shall be necessary to carry into effect the powers hereby conferred. That under this provision of the Constitution, the Legislature might authorize Commissions to fix rates and charges with reference to railroads, canals and turnpike companies, but they are not authorized to fix rates or charges for any other concern; that the fixing of rates and charges is a legislative question and unless authorized by the Constitution, no commission or body would have authority to make rates except the legislative branch of the Government; that the fixing of rates by anybody except the legislative body would be violative of article 19, Section 10 of the Constitution of the State of Arkansas, which provides that the legislative powers of this state shall be vested in a general assembly which shall consist of the senate and house of representatives. This section then provides for the enactment of laws by the people, but until a law is enacted fixing the rates, no board or commission can fix such rates. The only thing that the act creating the Arkansas Corporation Commission can do with reference to these things is to fix penalties for discrimination and things of that character, but they cannot legislate or make rates or charges. That prior to the passage of Act 571, which was approved April 1, 1919, there was no law in the State of Arkansas undertaking to delegate such power to the commission, and this act was passed long subsequent to the making of the contract alleged herein. While the legislature itself might have power to make rates without any constitutional amendment, it has not the power to delegate the power to anybody or right to pass laws or make rates.

Wherefore, respondent prays that the petition be dismissed, and [fol. 30] for all other and proper relief.

Daily & Woods and Mehaffy, Donham & Mehaffy, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 31] EXHIBIT TO RESPONSE

Articles of Agreement & Incorporation of the Clear Creek Oil and Gas Company

Know all men by these presents:

That the corporators hereinafter named for themselves do by these presents form a corporation under, and in pursuance of, the laws of the State of Arkansas in that behalf provided for "Incorporation for manufacturing and other lawful business," and in evidence thereof do hereby execute the following Articles of Incorporation.

First

The name of said corporation shall be Clear Creek Oil & Gas Company.

Second

The corporators are C. E. Speer, J. F. McGehee, Frank Engles, R. S. Robertson, St. Cloud Cooper, and J. E. Wright.

Third

The place of business is to be located at Fort Smith, Arkansas, and its offices for the transaction of business shall be in Fort Smith or at any such other place as the Board of Directors may select.

Fourth

The general nature of the business proposed to be transacted by this corporation is:

For the purpose of sinking wells, boring for, providing and transporting crude oil and natural gas, coal, asphalt and any other minerals which may be found in the development of their property.

Also to purchase, hold, transfer, convey and lease such real and personal property as the legitimate purposes of the corporation may require.

Also to borrow money, to issue bonds, and to pledge its property for the security of same, and the entering into of all obligations and contracts essential to the transaction of its affairs or for the purposes of the corporation.

Also to have and to hold, to enjoy and to exercise all the privileges and benefits conferred by the laws of the State of Arkansas, [fol. 32] upon corporations for manufacturing and other lawful business.

Fifth

The amount of capital stock of said corporation shall be $30,000.00 of which $15,000.00 has been subscribed and fully paid by the corporators aforesaid. The capital stock shall be divided into 300 shares of the par value of One Hundred ($100.00) Dollars each.

Sixth

The affairs and business of the corporation shall be conducted and controlled by the Board of Directors consisting of six members, all of whom shall be stockholders of the corporation. Said Board of Directors shall elect one of its members President, one of its members Vice President, and shall also select a Secretary and Treasurer.

Seventh

The first election of Directors shall be held immediately after the organization of the corporation, and said Directors shall serve for one year and until their successors are elected and qualify.

Eighth

The Board of Directors are empowered to ordain and establish By-Laws and Regulations necessary to the management and business of said corporation and alter and repeal same at pleasure.

Ninth

The first meeting of said corporation for organization shall be held at Fort Smith, Arkansas, at two o'clock on the 25th day of July, 1914.

The subscribers hereto here'y waive notice of said meeting.

In testimony whereof, We have hereunto set our hands on this 25th day of July, 1914.

——— ———.

———

[fol. 33] EXHIBIT TO RESPONSE

Certificate

Whereas, C. E. Speer, J. F. McGehee, R. S. Robertson, St. Cloud Cooper, Frank Engles and J. E. Wright, have associated themselves together as a body politic and corporate to be known as the Clear Creek Oil & Gas Company, and

Whereas, Said corporators being the subscribers to the Capital Stock of said corporation, having waived the fifteen days' notice as required by law, and called a meeting for organization to be held in Fort Smith, Arkansas, at two o'clock on the 25th day of July, 1914, and

Whereas, at the time and place above set out a meeting of the subscribers aforesaid was held to organize said corporation and elect six Directors, and

Whereas, at said meeting the following directors were elected, to-wit:

C. E. Speer, J. F. McGehee, R. S. Robertson, St. Cloud Cooper, J. E. Wright and Frank Engles.

Whereas, at the meeting of said Board of Directors, J. F. McGehee was elected President, C. E. Speer was elected Vice President and R. S. Robertson was elected Secretary and Treaurer.

Now, therefore, the said J. F. McGehee, President, and the said C. E. Speer, R. S. Robertson, St. Cloud Cooper, J. E. Wright and Frank Engles as Directors, do in pursuance of law, issue this, their Certificate, verified by their oaths, and do here'y certify as follows:

First. Said corporation is formed for the purpose of sinking wells, boring for, producing and transporting crude oil, natural gas, coal, asphalt and any other mineral found on their property. Also to purchase, hold, transfer, convey and lease such real and personal property as the legitimate purposes of the corporation may require. Also to borrow money, to issue bonds, and to pledge its property for the security of same, and the entering into of all obligations and contracts essential to the transaction of its affairs or for the purposes of the corporation. Also to have and to hold to enjoy and to exercise all the privileges and benefits conferred by the laws of the [fol. 34] State of Arkansas upon corporations for manufacturing and other lawful business.

Second. Its capital stock is Thirty Thousand ($30,000.00) Dollars, divided into shares of one hundred dollars ($100.00) each.

Third. Fifteen Thousand ($15,000.00) Dollars of said Capital Stock has been actually paid in by the subscribers hereto.

Fourth. The names of the stockholders and number of shares owned by them respectively are as follows:

C. E. Speer ..... 25 shares.
J. F. McGehee ..... 25 shares.
R. S. Robertson ..... 25 shares.
St. Cloud Cooper ..... 25 shares.
J. E. Wright ..... 25 shares.
Frank Engles ..... 25 shares.

In testimony whereof, the said J. F. McGehee, President of said corporation, and C. E. Speer, R. S. Robertson, St. Cloud Cooper, J. E. Wright and Frank Engles, a majority of the Board of Directors of said Corporation, have hereunto set their hands, on this the 25th day of July, 1914.

—— ——, President. —— ——, Directors.

STATE OF ARKANSAS,
County of Sebastian, ss:

J. F. McGehee, C. E. Speer, R. S. Robertson, St. Cloud Cooper, J. E. Wright, and Frank Engles, on their oaths say that the matters [fol. 35] and things in the foregoing Certificates set out are true to the best of their knowledge and belief.

—— ——.

Blank certificate omitted.

[fol. 36] EXHIBIT TO RESPONSE

Contract

Name of Parties to Agreement

This Agreement, made and entered into by and between the Clear Creek Oil & Gas Company, a corporation organized and doing busi-

ness under and by virtue of the laws of the State of Arkansas, party of the first part, and D. W. Kerr and H. S. Buck, parties of the second part; which terms "party of the first part" and "parties of the second part" shall include their respective heirs, administrators, executors, successors and assigns.

Description of Leases

Witnesseth: That, Whereas, said party of the first part owns or controls, by contract or otherwise, the right to produce, take or market natural gas from certain lands situated in the Counties of Crawford, Franklin and Sebastian, or other territory in the State of Arkansas or the State of Oklahoma, now comprising a total of 30,000 acres, more or less, as covered by blue print plat attached; and

Acquiring Leases and Purchase Gas

Whereas, the first party intends and agrees to procure by lease, sub-lease, contract or purchase, gas, for use under this contract, upon lands in addition to those which it now holds, owns or controls; and,

Smelting Plant

Whereas, said parties of the second part intend primarily to construct a smelting plant for the smelting of zinc or other ores at Fort Smith, in the State of Arkansas; and,

Inducement for Erecting Smelter

Whereas, one of the inducements for the location of said plant upon said lands is the procurement of natural gas from the said first party, during the life of the field, and the said first party desires to sell, and the said second parties desire to purchase a supply of natural gas for use in and about the construction, operation and maintenance of said smelting plant, or, for other future manufacturing uses of said parties of the second part;

Now, therefore, in consideration of the premises and of the covenants and agreements hereinafter contained, it is agreed by and between the parties hereto, as follows:

[fol. 37] Agreement to Furnish and Take Gas

First. Said first party agrees to furnish and deliver and said second party agrees to accept and receive, at the gas meter hereinafter provided for, dry and merchantable natural gas, to be furnished from the territory heretofore mentioned and shown by blue print attached, for use in the construction, operation and maintenance of second parties' works.

Time Construction of Plant

Second. Said second parties, to show their good faith in the fulfillment of this contract, are to commence the construction of said smelting plant within fifteen (15) days after the execution and delivery of this contract, and to prosecute said construction with due diligence and dispatch, and party of the first part agrees to begin the delivery of said gas, according to the terms of this contract, if so required by parties of the second part, not later than ninety (90) days from the execution of this contract.

Meter

Third. For the purpose of measuring said gas, said first party shall at its own cost and expense, install and maintain at some suitable point, to be selected by said second parties, upon the site of their works aforesaid, a good and sufficient standard proportional gas meter (The Industrial Instrument Company's Orifice Meter, or equal), and the delivery of said gas shall be made at a pressure of not less than ten (10) pounds to the square inch, at said meter. Said meter shall be read daily by said first party, and each reading thereof shall be conclusive upon both parties hereto, unless objection be made thereto within forty-five (45) days after the said meter is read; and it is further agreed that said second parties shall have the right to be present, by their representative, at any reading of said meter and at the testing of the same at any time, should they wish to do so.

Meter Testing and Reading.

Fourth. Either party hereto may require a test of said meter or of any meter or meters substituted therefor, as hereinafter provided, to be made upon giving the other fifteen (15) days' written notice thereof. If, upon the making of any such test, said meter or *or* [fol. 38] meters is or are found to be registering correctly, the expense thereof shall be borne by the party demanding the same, but, if incorrectly, such expense shall be borne by the other party hereto; and it is agreed that any meter which varies three per cent (3%) or less, shall be considered as registering correctly. If any meter fails to register, or upon test as aforesaid, is found to be registering incorrectly, such meter shall immediately be placed in condition to register correctly, or another meter registering correctly, substituted therefor; and the reading of such corrected or substituted meter for the period of time following such incorrect registration or failure to register—shall—taking into consideration the line pressure and number of blocks of said plant operated—to be the basis for determining the amount of gas during such incorrect registration or failure to register.

Fifth. Either party hereto shall have the right, at seasonable hours, to read, inspect and examine the gas meters and registers of the other.

Price of Gas and Manner of Payment

Sixth. Said second parties agree to pay for all the gas delivered under this contract, at the rate of four cents (4¢) for each thousand cubic feet, upon the basis of eight ounce pressure at the meter, located on the consumers property with the proper multiplier, applied according to the usages of the gas trade; and the time of payment for gas used during any month shall be on the 15th of the month following that in which the gas is consumed. Payment may be made directly to said first parties or deposited to its credit, in any reliable bank in Fort Smith, Arkansas, as may be desired by first party and mutually agreed upon.

Quantities Gas and Notices of Increase. Quantities Gas, and Notices of Increase of Quantity

Seventh. Said first party agrees to furnish to the second parties, whatever amount of gas may be required and requested by the second parties under this contract, until the expiration of one hundred sixty (160) days from the execution of this contract; and further agrees [fol. 39] to furnish to the second parties, and the second parties agree to accept hereunder, beginning one hundred sixty (160) days from the date of the execution of this contract, (not less than sixty million (60,000,000) cubic feet, as a minimum,)* of gas, for each thirty days (30) thereof, until September 1, 1918—at which time the accepting of any exact stipulated quantity by second parties, shall not be required; and it is agreed that the second parties shall have the right to demand and receive from said first party, any quantity up to and including one hundred fifty million ($150,000,000) cubic feet for each thirty (30) days, and to be supplied continuously, as required by second parties; and it is further agreed that if the second parties needs shall increase so as to require additonal gas to that hereinbefore provided, said second parties shall give one hundred twenty (120) days notice, in writing to the first party, of the additional quantity of gas necessary, and the first party agrees and promises that within one hundred twenty (120) days after receiving said notice, it will furnish to the second parties, additional quantities of gas, as required by said notice, except as provided in article number 12, relative to the life of the field—provided that in no event shall first party be required to furnish more than three hundred sixty million (360,000,000) cubic feet, as a maximum, for each thirty (30) days thereafter, during the life of this contract.

Providing for Shut-downs of Plant and Destruction of Same

Eighth. It is further agreed, that in case said smelting plant be destroyed or the operation thereof prevented, permanently or temporarily by strikes, fire, cyclone, tornado, windstorm, explosion,

*In original transcript the Clerk has this notation: This line written over one above; can't read it.

injunction, order or other process of any court, commission or tribunal, or by inability to procure ores when seasonably ordered, or by other similar or different acts beyond the control of said second parties, said second parties shall not be required to take gas hereunder, nor to pay for the same except such as may be actually received and used, while the operation thereof is so prevented, and shall [fol. 40] be under no obligation to make up the deficiency by the use of gas thereafter, provided and it is expressly agreed that in case said smelting plant is rebuilt or restored and cause of prevention in operation removed, the receipt and use of gas hereunder shall be promptly resumed; providing further, and it is further agreed, that if said plant be destroyed, second parties shall elect within ninety (90) days after such destruction, whether it will rebuild same, and if they elect to do so, the rebuilding thereof shall be commenced within ninety (90) days after such election, and shall be prosecuted with reasonable diligence to completion.

Damages to Person on Account of Handling Gas

Ninth. Said first party agrees to bear and to hold said second parties harmless from and indemnified against all damages to the person or property of third parties, or of second parties, caused in the furnishing, transportation and handling of said gas at and before the same passes from said point of delivery thereof to said second parties, and second parties agree to bear and to hold said first party harmless from and indemnified against all damages to the person or property of third parties, or of the said first part, caused in the handling or use of said gas, after the same passes said point of delivery.

First Call of Gas

Tenth. It is expressly understood and agreed, and notice to third parties hereby is given accordingly, that said second parties shall have first call upon the gas supplies of said first party now being, or which may hereafter be, obtained from any land within the counties hereinbefore mentioned, or other territory which may be acquired by first party, and that the right of said second parties to receive and take or to be supplied with the gas hereunder, from said territory, is prior and superior to any contract or agreement made or which may be made by said first party, for the furnishing of gas to others, from said territory. Said second parties agree to take their entire supply of gas from first party so long as the latter is able to furnish it, and in [fol. 41] the event party of the first part is ever unable to supply the entire needs of second parties, then second parties shall take from the first party all the gas they may need which party of the first part is able to supply.

Excess 15% Clause

Eleventh. In as much as the general supply of natural gas is of uncertain duration, and the construction, maintenance and successful operation of said smelting plant will require a heavy invest-

ment of capital and an abundance and staple supply of natural gas; and to the end that the supply now being, or which may be hereafter obtained by said party from the territory aforesaid may be conserved for the purpose of this contract, and as one of the inducements and considerations for the location of said smelter, said first party expressly covenants and agrees to and with said second parties, that so long as this contract remains in force, said first party will not either directly or indirectly supply or furnish natural gas from the territory covered by this contract, to consumers or others in an amount exceeding in the aggregate fifteen per cent (15%) open flow test of the total volume of gas being produced or procured, or both, from time to time, by said first party, from the territory comprising the source of supply hereafter. If, however, it can be demonstrated and shown to the reasonable satisfaction of second parties, that twenty per cent (20%) open flow will not endanger or shorten the life of the field, then, in such event, the twenty per cent open flow will be satisfactory to both parties.

Length of Time of Contract

Twelfth. This contract shall be and remain in force so long as gas in sufficient quantities to comply with the terms of this contract can be produced from the territory hereinbefore mentioned, now held by the first party or which may hereafter be held or controlled, directly or indirectly, by it, and which may be produced by reasonable diligent development and operation of land within the territory above described: provided, that in case the supply of gas hereunder at any time, permanently or temporarily fails or falls below the required quantity to be furnished as provided by article number 7 above, the second party shall have the right, at their election, to [fol. 42] continue this contract in force and to continue to make and receive hereunder, such lesser quantities of gas as the first party may be able to supply, in which event, and if necessary, the fifteen per cent or twenty per cent open flow restriction shall be temporarily removed, or permanently, if proven necessary to insure a sufficient and continuous supply of gas to second parties.

Factory Site

Thirteenth. This contract is conditional on the second parties securing a satisfactory site with switches and tracks free and without cost to second parties.

Selling Less Than 4¢ Provided for Like Reduction or Running at Loss

Fourteenth. It is further agreed by the parties hereto, that if market or other conditions at any time shall cause the plant of said second parties to be operated at less than a reasonable profit (for instance, to net less than 6% on the capital invested), while paying the price for gas provided in the foregoing then the first

party shall make a reasonable reduction in the price of gas, during such periods; provided, that first party shall have access to the cost records of the second parties, enabling first party to determine the proper adjustments.

It is also agreed that should first party ever sell or make any contracts to consumers or others, except churches, schools, hospitals, or charitable institutions, at a less rate of price than governs this contract, then, in such event, second party shall pay for all gas consumed on a price basis equal to such lower price or prices during the entire time they are in effect.

Authority for Signatures

In testimony whereof, party of the first part has by order of its board of directors, hereunto caused these presents to be signed by its President, and attested by its Secretary, and caused its corporate seal to be hereunto affixed, and said parties of the second part have hereunto set their hands and seals, this Seventeenth Day of March, 1916.

Clear Creek Oil & Gas Company, by J. F. McGehee, President. D. W. Kerr, H. S. Buck. Attest: R. S. Robertson, Secretary. (Seal.) (Tr., 8-17.)

[fol. 43] J. F. McGehee, a witness for petitioners, after being duly sworn, testified as follows:

Judge Hill: State your name, residence and occupation.

A. J. F. McGehee; I reside in Ft. Smith; President Clear Creek Oil & Gas Company, President and Manager.

Q. Have you a copy of the Articles of Incorporation of the Clear Creek Oil & Gas Company?

A. Yes sir.

Q. Is that a correct copy of them?

A. I haven't read all this over (referring to document.) Do you want me to read it all over?

Judge Hill: No.

Witness: This is a correct copy.

Judge Hill: I want to introduce that as an exhibit to his testimony.

(Articles of Agreement & Incorporation of the Clear Creek Oil and Gas Company marked "Exhibit 1 (McGehee)" and filed.)

Q. What date does that show the incorporation?

A. The 29th day of July, 1914, it was acknowledged on the last page—the 25th day of July.

Q. You actually did not begin operations for quite awhile after that?

A. We began drilling in November following that; we brought in the first well in November.

Q. Begin with the development out there, and in your own way give a brief history of the development of the Kibler field.

Judge Mehaffy: I don't know just what your rules of procedure are in a case like this, but we want to know if we may object to testimony.

Chairman Wilson: Make objections each time and let the records show it. The objections will be overruled and you can save your exceptions.

Judge Mehaffy: We object to this testimony.

Objections overruled and exceptions saved.

[fol. 44] Witness: In the year 1914, early in the year 1914, J. E. Wright and myself began taking leases in what is now known as the Kibler Field. After we had taken about 5,000 acres of leases, I saw Mr. Robertson and mentioned the matter to him, and he says. "Well, go ahead and get up a big bunch and I will get some business men of Fort Smith to go in with me here and we will raise some money to develop them." We got up something, I think, in the neighborhood of 20 or 25,000 acres and reported to Mr. Robertson and he got Dr. Cooper and C. E. Speer to join him and they raised the money here by selling stock to the Fort Smith business people to sink the first well.

Judge Hill: How much were you capitalized for to start?

A. $30,000.00.

Q. How much did you pay for leases?

A. $15,000.00.

Q. In stock?

A. Yes sir.

Q. That was something like 25 or 30,000 acres?

A. 20 to 25,000 acres.

Q. $15,000 was paid in cash?

A. Yes sir, stock was sold for $15,000.

Q. That gave you $15,000 cash to operate on your twenty-odd thousand acres of land?

A. Yes sir.

Q. When did you begin the first development?

A. In the fall of 1914.

Q. 1915, was it not?

A. 1914. Yes, 1915 is correct,—the next year.

Q. What was the result of your first development?

A. We struck a gas well producing about 12 or 13 million feet.

Q. How much did that well cost you?

A. About $45,000.

Q. Completed?

A. Yes, sir, closed in.

[fol. 45] Q. And about 12 million feet of gas?

A. Yes sir.

Q. Then what was the next step taken?

A. The next step taken was to sell this gas.

Q. Was gas being used as fuel in Fort Smith at that time?

A. I don't positively know, but I think there might have been a small amount used here, but that it was not very generally used was my understanding.

Q. What fuel were the various factories and industries running upon at that time?

A. Coal.

Q. The domestic and commercial—I mean the residences and commercial houses were supplied with gas at that time?

A. They were.

Q. Do you know where the gas came from that was supplied?

A. Mazzard and Poteau Field.

Q. The Poteau Field, how far is that from here?

A. About 30 miles.

Q. Your first move was to sell your gas? State what you did in that respect?

Judge Mehaffy: We want to object to all testimony about development.

(Objection overruled and exceptions saved.)

Witness: We entered into a contract with Buck & Kerr, was the first move we made. The first contract was with D. W. Kerr and H. S. Buck.

Judge Hill: I find that the copy I have lacks the back page; I will introduce it at this time but will not give the stenographer this copy, because it does not seem to be complete. I will ask that it be recorded as Exhibit No. 2 and we will substitute a correct copy.

Chmn. Wilson: All right, let it be filed as "McGehee No. 2."

(Document entitled "Contract," purporting to be an agreement entered into between the Clear Creek Oil & Gas Company and D. W. Kerr and H. S. Buck introduced, marked "Exhibit 2 (McGehee)" and filed.)

[fol. 46] Judge Hill: It appears to have been made March 17, 1916?

A. That was about the date.

Q. At that time you just had one well?

A. Yes sir.

Q. Had Kerr & Buck then located where they would place their smelter?

Witness: At the time they made this contract?

Judge Hill: Yes sir.

Witness: No sir, I think the land had not been procured by them at that time.

Q. I believe it was provided that the location should be donated by the city or the Business Men's organization?

A. Yes sir.

Q. And that was done?

A. It was.

Q. Where were they located?

A. South Fort Smith.

Q. Had you at that time constructed your pipe line?
A. We had not.
Q. Had you arranged for it, made your contract?
A. No sir.
Q. Did you agree with these parties that you would furnish a pipe line to transport your gas to them?
A. We did.
Q. Was it agreed what size pipe line that should be?
A. I don't think that was mentioned.
Q. Not at that time?
A. No sir.
Judge Mehaffy: You mean that agreement was oral?
A. No sir; that was in the contract.

Judge Mehaffy: We object to him testifying that they made an agreement, if it is in the contract; that speaks for itself.

(Objection overruled and exceptions saved.)

[fol. 47] Judge Hill: I will read from the contract, Clause 13 (Reads): "This contract is conditional on the second parties securing a satisfactory site, with switches and tracks, free and without cost to second parties." That is the clause you are referring to?
A. That was about their site, yes sir.
Judge Hill, I will read this clause: "Whereas, said second parties intend primarily to construct a smelting plant for the smelting of zinc or other ores at Ft. Smith, in the State of Arkansas." I read that to ask you if that is a correct statement, that they were to locate at Ft. Smith?
A. It was.
Q. This contract contains—probably I had better read that clause rather than have him state it. It contains the first call on the gas, and I am specifically calling attention to this one feature. (Reads Tenth Clause of the aforementioned contract:)

"It is expressly understood and agreed, and notice to third parties is hereby given accordingly, that said second parties shall have first call upon the gas supplies of said first party now being, or which may hereafter be, obtained from any land within the counties hereinbefore mentioned, or other territory which may be acquired by first party; and that the right of said second parties to receive and take or to be supplied with the gas hereunder, from said territory, is prior and superior to any contract or agreement made or which may be made by said first party, for the furnishing of gas to others, from said territory. Said second parties agree to take their entire supply of gas from first party so long as the latter is able to furnish it, and in the event party of the first part is ever unable to supply the entire needs of second parties, then second parties shall take from first party all the gas they may need which party of first part is able to supply."

Is that a correct reading of the contract?
A. As I remember it that is.

Q. What was that date?
[fol. 48] A. March 17, 1916.
Q. At or about this time did your company obtain any franchises from any municipalities?

Mr. Daily: We object to that—"at or about this time;" we think they ought to show exactly whether it was before, at or after that time.

(Objection overruled and exceptions saved.)

Judge Hill: I am going to show that.
Witness: On February 7, 1916, we got a franchise for the town of Alma; on March 2, 1916, with the town of —; March 14, 1916, with the town of Clarksville. We haven't the date of the Van Buren franchise, but on April 5, 1916, we got a franchise from the city of Ft. Smith.

Chmn. Wilson: This first contract was made on the 17th of March?
A. The 17th of March, the first contract with Buck & Kerr.
Q. Buck & Kerr are now the Ft. Smith Spelter Company?
A. Yes sir.
Judge Hill: At or about that time did you apply for a franchise——

Mr. Daily: We want to object to that and ask to have it excluded for the reason that that is not the proper way to show whether they have a franchise or not. That is not a technical objection, for I think his statement with reference to the franchise in the city of Fort Smith is absolutely incorrect as a matter of law and I think the way to prove that is to produce a copy of the franchise.
Judge Hill: We will produce both the Ft. Smith and Van Buren franchises.

Judge Hill: At or about that time did you make any application to the County Court of Crawford County for a right of way over the highways?
A. We did.
Q. Do you know that date?
[fol. 49] A. I do not.

Judge Mehaffy: We object to that.

Judge Hill: You made application on behalf of your company?
A. Yes sir.
Q. Did you make a similar application in Ft. Smith?
A. No sir, I did not, but the company did.
Q. Mr. Speer or Mr. Robertson handled that?
A. Yes sir, they were handling that end.
Q. Did you lay your pipe line in the highways of Crawford and Sebastian Counties and through the streets of the cities of Ft. Smith and Van Buren?
A. We did.

Q. What was the second contract that you made?
A. With L. Vogelstein & Company.
Q. I hand you a copy of that contract and ask you to deliver it to the stenographer and have it marked "Exhibit 3."
A. That is a copy of the contract.

(Document marked "Exhibit 3 (McGehee)" and filed.)

Judge Hill: This shows on its face to have been made on a blank date in May. The date does not appear to have been given.
Witness: Mr. —— says it is the 3rd day of May, 1916.
Judge Hill: I wish you would read to the Commission the 6th Clause.
Witness (reads): "Party of the first part agrees to complete and finish the construction of a ten inch pipe line to the site of the smelter within ninety (90) days from the date hereof, strikes, weather conditions and acts of Providence excepted."
Judge Hill: There is another clause in there regarding payment for pipe line, towards the end; I don't remember the number of it.
Witness: It is Section XV. (Reads:) "Parties of the second part further agree that upon the completion of the construction of the pipe line by Clear Creek Oil and Gas Company to the first smelter [fol. 50] of the second parties, parties of the second part will pay to said party Forty-five Thousand Dollars ($45,000.00), in cash, which said sum with six per cent interest per annum thereon until paid, said first party agrees to repay to parties of the second part in gas delivered at the smelter of second parties, at the rate of four cents (4¢) per thousand cubic feet, as hereinabove specified. Parties of the second part agree that they will take sufficient gas during the first year to repay Fifteen Thousand Dollars ($15,000.00), and the interest thereon, and to take sufficient gas during the third year to repay Fifteen Thousand Dollars ($15,000.00), and the interest thereon."

Q. Did they advance you that money?
A. They did.
Q. At the time that contract was made, what was the status of your pipe line. Had you bought it then?
A. We hadn't done anything on it at that time.
Q. On the 3rd of May?
A. Yes sir.
Q. What did your pipe line cost you?
Witness: The original line?
Judge Hill: Yes sir.
Witness: About $165,000.
Q. When was it constructed, approximately the date, since you cannot give it exact?
A. We began as soon as we could get the pipe, and it was finished within ninety days. We had it laid to Van Buren and I don't remember just when we completed South Fort Smith, but the work went right on and there was no interruption.

Q. Was the pipe line constructed there before the smelter was finished?

A. Pretty close to the finishing of the smelter, I think we both got ready about the same time.

Q. Was that also true of the smelter at South Fort Smith?

A. I think so; I think we got it there too.

[fol. 51] Q. Both completed about the same time?

A. Yes sir.

Q. When did you begin delivering gas?

A. I believe I would have to look the books up on that,—60 to 90 days. That would be June or July.

Judge Hill: I think it was earlier than that. June 16, 1916, is the first charge shown on this statement, $257.00. That was a very small amount. That would indicate that you began furnishing gas early in June?

A. Yes sir.

Q. Was that South Fort Smith or Van Buren?

A. Van Buren.

Q. What about the development in the meantime? Were you drilling any wells at that time?

A. At the time we made the Vogelstein contract we had the second well near completion; I think we had a fishing job at that time. We were right close to sand 2,100 feet deep.

Q. You brought that in, did you?

A. Yes sir, we brought that in.

Q. Did you have any other wells completed by the time you began supplying gas to the smelters?

A. I think so. I don't remember just how many. We kept right on drilling until we drilled 12 or 13 wells.

Q. What was the next contract you made, Mr. McGehee?

A. With the Athletic Mining & Smelting Company. That was with Mr. Charles T. Orr at the time we made it.

Judge Hill: I have that contract before me, dated 8th of November, 1916, between Charles T. Orr and the Clear Creek Oil & Gas Company. I will ask you to identify that and have it made Exhibit No. 4 to your testimony.

A. This is a copy of the contract.

(Document marked "Exhibit 4 (McGehee)" and filed.)

Q. What was the purpose of this contract?

[fol. 52] A Selling them gas.

Q. They erected a smelter under it?

A. They did.

Q. Was the Athletic the one that was erected under this contract?

A. It was.

Q. I want to read you this clause, the 17th clause. (Reads:)

"The Vendor hereby covenants that it has ten (10) producing gas wells on its said territory, and that on the 15th day of September, 1916, the open flow daily capacity of its said wells was 87,725,000 cubic feet of gas.

"Subject to the other provisions herein, the Vendor covenants that it will at all times during the term of this contract continue its development, so that the measured capacity of its wells shall be at least five times the volume of gas it shall have contracted for maximum delivery. The extent of diligence required of the Vendor with respect to drilling operations is hereby prescribed and agreed to be as follows, i. e., the full development, according to the usages of the gas business, of what may be regarded as "proven territory," such as the Kibler field is at the time of the making of this contract, (referring to Sections 19, 27, 28, 29, 30, 31 and 32, Township 8, Range 31, Crawford County, Arkansas); also a reasonable exploitation or testing of unproven territory under lease, and when any such is shown to be productive or proven territory, to be fully developed according to the usages of the gas business."

Is that a correct statement of the situation at that time?
A. It was.

Judge Hill: So your development had progressed from November, 1915, to November, 1916, to 10 producing wells, with that volume of gas there shown. Now, Mr. McGehee, what other customers' contracts did you take on after these three smelters?

A. The next one was C. P. Zenor and others, now the Model Window Glass Company.
Q. And what was the next to that?
A. Parks and Carney, now the Radiant Glass Company.

Judge Hill: I don't think it necessary to introduce these contracts; they are about the same in substance.
Judge Mehaffy: If there is going to be anything about contracts, we want them introduced.

Judge Hill: I will bring them over. You took on other industries besides these five mentioned?
[fol. 53] A. Yes sir.
Q. Some of those you probably took on before you made the contracts with the glass factories?
A. Yes sir.
Q. Do you know how many industries you had all together, your maximum amount?
A. 19, I think.
Q. Were they all in or about the city of Fort Smith or South Fort Smith?
A. They were in the city of Fort Smith, South Fort Smith and Van Buren, just outside the corporate limits.
Q. The smelter was the only one in Van Buren?
A. Yes sir.
Q. Then you had 18 industries in or about the city of Fort Smith?
A. Yes sir.
Q. How long did you continue to supply these various industries?
A. We supplied them all up until the Fall and Winter of 1918.
Q. What was the situation then?

A. We did not have enough gas for all of them.

Q. What about your development in the meantime?

A. It had stopped.

Q. Why had it stopped?

A. For want of funds.

Q. What did you do about finances after you brought in that first well?

A. When we began to build the pipe line we borrowed the money. I think the —— Hardware Company sold us that pipe and we had to borrow the money to pay for it.

Judge Mehaffy: We object to all that testimony.

(Objection overruled and exceptions saved.)

Judge Hill: You borrowed the money to pay for your pipe line; [fol. 54] did you issue any further stock?

A. We did.

Q. State to the commission what was done about that?

A. We increased our capital stock to $50,000 and we sold 15,000 of that stock at 5 for 1, which brought us $75,000 in cash.

Q. Then you borrowed the money to pay for your pipe line, and then what about your development expense?

A. That all came out of borrowed money and this sale of stock.

Q. Did you at any time mortgage your plant or property?

A. We did, in order to pay the Speer Hardware Company.

Q. How much of a mortgage did you place on the property?

A. We bonded the company for $120,000, and we sold around $100,000 of these bonds. There was $111,000, I believe it was.

Q. You had a mortgage indebtedness of $11,000?

A. Yes sir.

Q. Did you pay Speer in full for that or leave part of it unpaid?

A. No, we did not pay them in full; I think we still owed them about $15,000 or $16,000.

Q. Then your well development, do you know about what that cost you up to the time you had this shortage?

A. About 45 or $50,000.

Q. Your wells?

A. Yes sir.

Q. Didn't you have about 15 wells? I am asking about up to the time of the shortage in 1918?

A. It cost us about $75,000.

Q. Then, in round numbers, you had spent for well drilling about $75,000, and for pipe along about $65,000. How much was your leases costing you a year?

A. I think we paid out something like 15 or $20,000 on them the first year, or $25,000. We had quite a lease expense, and I would [fol. 55] have to refer to the books.

Q. A very large item?

A. Yes sir.

Q. Did you drop part of that leasing?

A. We did.

Q. You found it unprofitable and unproductive?
A. It was unproductive of gas. When we drilled some wells that showed up an area that was non-productive, we dropped it.
Q. In that way you cut down the rentals?
A. Yes sir.
Q. Now, tell us about the shortage of gas, when that occurred and what was done in regard to that.
A. It occurred in 1918, the year 1918. We made an attempt at that time to get the price raised, and failing to do so, and not having money to drill, we began cutting off customers.

Judge Mehaffy: We object to that testimony about an attempt to get the price raised.

(Objection overruled and exceptions saved.)

Judge Hill: Did you call the attention of these three smelters to the situation in the field and your financial condition?
A. We did.
Q. Did you notify them that you could not develop the field furthere under that price of gas?
A. We did.
Q. Did you ask them to increase the price so that you could develop the field?
A. We did.
Q. And they refused?
A. They refused.

Judge Mehaffy: We object to all that testimony about that offer and refusal.

(Objection overruled and exceptions saved.)

Judge Hill: Did you also notify them then or later that the gas was costing you more than they paid of it?
[fol. 56] —. We did.
Q. Did you submit to them your books or records of accounts showing the facts?
A. We did.
Q. Did you continue to negotiate with them six months or a year, trying to get them to increase the price of gas?
A. Yes sir.
Q. And all efforts failed?
A. Yes sir.

Judge Mehaffy: We object to that testimony.

(Objection overruled and exception saved.)

Judge Hill: What did you do in regard to drilling then, did you do any more drilling?
A. We did not do any more drilling until along about the close of 1918 or the first part of 1919, when we drilled one more well. We did drill a shallow well in the Williams or old Kibler field.

Q. You drilled one well in the meantime?
A. Yes sir.
Q. Without going into detail, I will ask you to state the situation with regard to cutting off these customers.
A. What they did to keep from being cut off?
Judge Hill: Yes.
A. We notified, first, the smaller industries, outside of the 5 large ones—the three smelters and the two glass factories that they would have to go off the line. The Best-Clymer Manufacturing Company got out an injunction. They had a big lot of food stuffs that would waste if they did not get gas and they were granted an injunction. The Union Seed, Cotton Oil Mill, the Union Seed & Fertilizer Company, had to have time to get a stack put up so they could burn coal, and they were granted an injunction. After that, then, I believe the next injunction was granted to the glass factories.
Q. Did you notify the glass factories to come off?
A. We did.
Q. What did they do?
A. Got out an injunction.
[fol. 57] Q. What was the next one that you attempted to cut off?
A. The Athletic Mining & Smelting Company.
Q. What did they do?
A. Got out an injunction.
Q. Then what occurred?
A. These cases came up in the Chancery Court.

Judge Mehaffy: Before you go into that, I want to object to all this testimony about cutting off, and especially that part where he said they got out injunctions. We object to that because it is irrelevant, and incompetent in this investigation, also because it is not the best evidence; the best evidence of obtaining an injunction would be the record.

(Objections overruled and exceptions saved.)

Judge Mehaffy: Objections by one of us goes for both myself and Mr. Daily.
Chmn. Wilson: Let the records show that.

Judge Hill: You cut off all your customers except those you were prevented from cutting off by injunction?
A. We did.
Q. With the exception of the City Waterworks?
A. Yes sir.
Q. Did you serve notice on them to get off?
A. We did.
Q. Why were they not cut off?
A. The reason they did not come off finally was when the Fuel Administration took hold of it.
Q. They took hold right away?
A. Yes sir, about the same time.
Judge Hill: The Fuel Administration took charge, according to my memorandum, October 1, 1918.

A. About that time.

Q. And continued until Feb. 1, 1919?

A. I think it was until after the armistice was signed.

[fol. 58] Q. It continued until after the first of the year, at any rate?

A. Yes sir.

Q. Under the Fuel Administration were not all priorities abolished? I mean contract priorities abolished and war priorities established?

A. Yes sir.

Q. Did you draw during the period of the Administration more than 20 per cent of the open flow?

A. We did.

Q. You could not cut off anybody?

A. There were some that we could cut off and did cut off.

Q. I mean those that stayed on the line?

A. Those that the Administration ordered us to leave on we could not cut off.

Q. Only those stayed on the line that were protected by injunction or orders of the Fuel Administration?

A. Yes sir.

Chmn. Wilson: When the Fuel Administration took charge, were the injunctions dissolved?

Judge Hill: No sir, they let them stand.

Judge Hill: I am coming to the matter about the rate agreement that took place in the Chancery Court room. I don't think that you have any jurisdiction at all of that matter, but I do think it is part of the history of this case that is necessary for you to consider. I can ask it of this witness or I believe I can make a statement that these gentlemen will agree is a correct statement of the situation in that regard.

Chmn. Wilson: No contract was ever entered into in writing?

Judge Hill: If I go into it I want to introduce evidence or take statements of what the conditions were so it will be clear in this record. It is only important here as a part of the history of the case.

Chmn. Wilson: Have you a copy of the contract?

Judge Hill: There was no written contract.

[fol. 59] Judge Mehaffy: We have a copy of all the evidence taken in the Federal Court.

Judge Hill: Which is about 400 pages and I am trying to get rid of introducing that 400 pages here.

Judge Mehaffy: I want to make this suggestion: I don't think any of it is competent, but if it is considered at all, we want it all considered. If Judge Hill is going to introduce part of it, he can rest assured that the balance of the 400 pages will go in.

Chmn. Wilson: I cannot get through my mind why a contract in name only and never entered into can ever get into the testimony.

Judge Hill: It is a part of the history of the case. We contend there is a valid contract for 8-cent gas. They deny that. The Fed-

eral Court decided for them on that hearing and that question is now pending in the Circuit Court of Appeals, whether that is a valid contract. The matter just amounts to this: there is a contract with these people for 4 cents or for 8 cents. We contend we have a valid contract for 8 cents and they contend they have a valid contract for 4 cents. That is really all I want to put in evidence.

Chmn. Wilson: You contend it is a valid contract for 8 cents, but you say it is not in writing?

Judge Hill: Yes.

Chmn. Wilson: Simply a verbal contract?

Judge Hill: Yes sir, that was agreed to by all parties, and under performance of that contract we were to drill four wells and now instead of having a shortage of gas we have a surplus.

Chmn. Wilson: Did your company undertake to carry out that contract?

Judge Hill: We did carry it out.

Comr. Brasher: How does it happen that the contract was never signed?

Judge Hill: Because we had a controversy with one of the parties about the terms of it. That is the situation.

Comr. Wood: What would that have to do with the jurisdiction of this commission to fix a reasonable charge?

Judge Hill: Nothing, except that it is history. If we are right, it [fol. 60] is an 8 cent contract; if they are right, it is a 4-cent contract.

Comr. Brasher: You are asking the commission to find and give you a reasonable rate?

Judge Hill: Yes sir, in lieu of the contract rate.

Comr. Brasher: We might find 8 cents or 4 cents or 10 cents, or any other rate to be reasonable, and your contract, if we take jurisdiction, would be of no value any way.

Judge Hill: I don't think it would. I just wanted you to understand the history of the case.

Chmn. Wilson: If your company undertook to carry out your contract in good faith, and the others did not; if your company did what they said they were going to do and the others did not, it would seem to be a valid contract.

Judge Hill: You have stated very accurately our situation.

Judge Mehaffy: You have stated it on Judge Hill's statement alone. It has been tried in a court of competent jurisdiction and the court decided there is not a word of truth in it.

Chmn. Wilson: You know we differ with the courts.

Judge Mehaffy: You can honestly differ, and what I am stating is that you would be correct if his statements were correct, but with all respect to him, I say it is not.

Judge Mehaffy: I want to make myself understood. As you say, if a contract was made and they lived up to it and we did not, it might have some bearing on the credibility of the witnesses, therefore, if you are going to go into the question of whether they made a contract, and take their history, you have to take both sides. The only question that was tried in the Federal Court,—there was no other issue but the one single question of whether they made a con-

tract, and after about a week's trial before the Federal Court it was decided there was no contract made. Judge Hill states that they lived up to it. If you want to go into that question, we are prepared to show not only——

[fol. 61] Chmn. Wilson: So far as I am concerned, I don't care to go into it. I said that if one side did undertake to carry it out and the other did not there would be a question.

Judge Mehaffy: If you go into that at all, we will not only show the Federal Court record, but we are prepared to show that they did not do anything of the sort.

Comr. Wood: I am not interested in any contract you may have at all. The only thing I am interested in is your right to make a contract.

Comr. Brasher: I don't think it necessary to burden the record with evidence of that.

Comr. Wood: You might agree on a statement relative to that as historical only; it would not be determinative.

Judge Mehaffy: We would agree that the record of the testimony taken in the Federal Court could be introduced.

Judge Hill: I don't think any of these details are material at all, but I do think you should know something about what occurred. We have a surplus of gas now, due to development that took place after that rate agreement was made, and that becomes a material item.

Chmn. Wilson: I don't think the history of the development has much to do with the rate.

Judge Hill: The cost of the development has a good deal to do with it.

Chmn. Wilson: The commission does not feel that it is worth while to go into that.

Judge Hill: Very well.

Judge Hill: You referred incidentally to the Crow well being brought in. Tell something about that and the development of what we call the Williams field as distinguished from the Kibler field?

A. That was in the latter part of 1918 or the first part of 1919. Mr. Crow drilled a well on land belonging to a man named Williams. They drilled it in about the first of January, 1919, and that well showed a rock pressure around 280 pounds. It was about a 7 million foot well, may be a little larger. It clearly demonstrated to us that [fol. 62] they have made a find of a new gas field.

Judge Mehaffy: We object to that testimony and especially that part where he says it demonstrated to them.

Witness: We drew the conclusion.

Judge Hill: What was the rock pressure in the Kibler field?

A. Around 115 to 120 pounds.

Q. Would the new wells coming in the Williams field have the rock pressure that the initial wells came in on?

A. The new wells drilled in the Williams field came in with perhaps a little greater rock pressure than the other wells. I should

have said Kibler field in the first instance. A well drilled in sometimes showed a little more, depending on the distance it was from the oil wells. The rock pressure in the Kibler field was 150 pounds but in the new Williams field they would come in at 250.

Q. You believed you had found a new field. What did you do then?

A. We drilled one well offsetting that Crow well.

Q. That means on an adjoining lease?

A. Yes sir.

Q. What kind of a well did you get?

A. About the same size and same rock pressure.

Q. Then after this rate agreement on Feb. 3, 1919, did you make any agreement to get any more gas in the Williams field?

A. We did.

Q. Who was that agreement with?

A. Mr. Cazort.

Q. State to the commission what that was.

Judge Mehaffy: We object to that testimony.

Judge Hill: We just want to prove the general terms of the Cazort contract. If they want the whole contract we will put it in.

Judge Mehaffy: I have no objections to your showing they made a contract with Mr. Cazort for gas at 6 cents. If they want to go any further, I want the contract.

[fol. 63] Judge Hill: The Cazort contract was that he was to drill three wells?

Witness: No sir, we were to drill three wells for Cazort, at the stipulated price of $1.60 per foot.

Q. Who was to pay you for them?

A. When we had the drilling done he was to pay for it.

Q. You were to pay him 6 cents for gas at the well?

A. Up to 3 million feet if 20 per cent of the open flow would produce that.

Q. These wells were drilled, were they?

A. They were.

Q. What other drilling, if any, has the Clear Creek Oil & Gas Company done in addition to that Cazort drilling?

A. In the Williams field we had one well drilled at that time. Since then?

Judge Hill: Yes.

A. We have drilled six other wells in the Williams field.

Q. Besides the Cazort wells?

A. Yes sir.

Q. State about what these wells cost you and about what gas you have produced on them?

A. Those wells have cost us about $7,500 to $10,000. In one we got about 9 million feet, in another about 10, another about 12, another 5 and another about 24 million feet, which has now decreased to 2½ million.

Q. That was the big well, was it?

A. Yes sir.

Q. It is now 2½ million?

A. Yes sir.

Q. What was the volume of the Cazort wells?

A. They run from about 2 to 4 or 5 million, about 10 million I think all together when we brought them all in.

Q. Not as large wells as those you got?

A. No sir.

[fol. 64] Q. What are the requirements of these five customers, the three smelters and two glass factories?

A. Their full requirements or what we are required to furnish?

Q. What you are required to furnish.

A. We are required to furnish all of the Ft. Smith Spelter Company's gas, which is about 3,800,000 ft.; about 1¼ or 1½ million feet to the Arkansas Zinc & Smelting Corporation, and the full requirement of the Athletic Mining & Smelting Company is about 3½ or 4 million feet.

Q. What are they taking on an average?

A. It varies a great deal. I could hardly give you the average. The glass factories is about 1½ million for the two.

Q. You have a few other consumers on your line, approximately how much?

A. About half a million, the rest of them; that is, daily consumption.

Q. In the complaint there is a statement of your financial condition as of March 1, 1920. If you don't remember the figures you might take that and state what the financial condition of the Clear Creek Oil & Gas Company was on March 1, 1920.

Judge Mehaffy: We object to that.

Witness: There was an indebtedness of $74,868 24.

Comr. Wood: You might state the reason for your objection.

Judge Mehaffy: The objection is that it does not make any difference what their financial condition is. Here is the idea: Suppose they are a public utility, don't you fix the rate for gas, a reasonable rate, without regard to their financial condition at all? On the other hand, suppose they had a right to make our contract, and you have got to decide one or the other of these, and either view you take of it you cannot consider their financial condition it seems to me. If we have a valid contract that you cannot impair by your order, a valid contract, then of course it is immaterial; if it is a public utility and our contract is voidable, then it is immaterial because you fix a reasonable rate.

[fol. 65] Comr. Wood: How are we going to know what a reasonable rate is unless we know what it cost?

A. They are not asking what it cost. They are asking the concern to show its financial condition.

Comr. Wood: Would not their financial condition reflect the cost of operation?

Judge Mehaffy: I don't think it reflects anything except the management.

Comr. Brasher: You can develop anything with reference to mismanagement.

Judge Mehaffy: The point I am trying to make is, it does not make any difference whether they have a million dollars in the bank or owe a million dollars; it does not affect the reasonable price of gas.

(Objection overruled and exceptions saved.)

Judge Hill: What is the financial condition of your company?

Witness: There has never been a dollar dividends paid to the stockholders.

Witness: And we have kept our overhead down, trimmed off all lease expense and claims, everything we could.

Q. They are talking about mismanagement; you are President and Manager, what salary do you draw?

A. I draw $150.

Q. Mr. Robertson is Secretary and Treasurer?

A. Yes sir.

Q. What salary does he draw?

A. Nothing.

Q. How long has he served in that capacity?

A. Since the company was organized.

Q. What are Mr. Robertson's services reasonably worth?

Judge Mehaffy: We object.

A. $250 a month.

Q. He has devoted a great deal of time to it?

[fol. 66] A. For a good while he devoted more time to that than to his grocery business.

Q. What do such positions as you occupy, President and General Manager of this company in Fort Smith, generally pay?

A. About $5,000 a year, something like that.

Q. Really these two executives would be entitled to about $8,000 a year if they charged for their full services?

A. Yes sir.

Q. How much of a field force have you?

A. We have a bookkeeper whom we use as a combination man. He reads meters in South Fort Smith and occasionally goes out and helps make repairs if necessary. We have a superintendent and we keep one man in the field to look after the blowing of the wells and attend to them, and occasionally we have to lay a line or something of that kind and we hire the necessary labor.

Q. Are you operating as cheaply as possible to conduct the business properly?

A. Yes sir.

Q. Who is your company taxed by?

A. The Tax Commission.

Q. You file a return to it every year?

A. Yes sir.

Q. And they make the taxation?

A. Yes sir.

Q. Has this commission required you to file your schedule of rates with it?

A. The Tax Commission?

Q. The Corporation Commission?

A. Yes sir.

Q. Have you done so?

A. We have.

Q. Are you familiar with the price of coal here, or had I better use someone else on that?

[fol. 67] A. I haven't bought any coal and haven't had a quotation.

Q. Did you look into the price of gas in Oklahoma and other places at the time you entered into this contract at 4 cents?

A. We did.

Q. What did you find the prevailing prices then were?

A. 3 to 4 cents; that is, for smelters.

Q. Big consumers?

A. Yes, sir.

Q. Running from that on up?

A. Yes, sir.

Q. Do you know what the price of gas in Oklahoma now is for smelters?

A. I think it is about 10 or 12 cents. In Kansas it is a good deal more than that.

Q. Do you know what the minimum is in Kansas?

A. No, sir, but I know one large consumer who is paying 15 cents.

Q. I wish you would explain a little more fully about the wells in the Kibler field, what volume you are getting out of them?

A. We get very little gas from them. We have got them on the line and the larger pressure in the Williams field holds these wells back. They gradually build up their rock pressure until they put a little in and then drop back.

Q. Without the rock pressure that goes into the line from the Williams field, what gas would you get from the Kibler field proper?

A. I could not answer that question, but it would be a small amount.

Q. What pressure is required to deliver your gas to South Fort Smith that will fill the requirements of your customers?

A. Do you mean just the customers in South Fort Smith?

Q. I mean to fulfill the requirements of your five customers on down to South Ft. Smith?

A. It will take 75 pounds at the field warehouse.

[fol. 68] Q. Where is that?

A. Right in the heart of the old Kibler field.

Q. Is that where you measure your line pressure?

A. Yes, sir.

Q. You have to have 75 pounds there in order to carry the gas through to various customers and deliver the requirements to South Fort Smith?

A. Yes, sir.

Q. How much pressure do you have to have in the wells to make 75 pounds pressure at your warehouse?

A. It will have to run from 100 to 125 pounds, depending on the distance of the well from the main line.

Q. Then for the purpose of supplying gas to your five customers we are referring to, after your wells go under 100 pounds pressure you cannot do that?

A. We cannot supply them. If they go under 100 pounds none of them would get enough. The one closest to the field might get enough but the ones farthest away would not get their requirements.

Q. What would be the effect if you cut off your customers, if the pressure would be such that you could not supply these customers at the far end of the line, what would be the effect on your company?

A. It would cut off our revenue.

Q. Could you continue business if you could not supply these customers?

A. We probably could for a time, but in a short time it would reach such a stage that it would not take care of the property and rentals on leases.

Q. As a commercial proposition you have to have 100 pounds pressure?

A. Yes, to do any good.

Q. What is the pressure in the Williams field now?

A. The average is about 170 or 160 pounds.

Q. What is it in the Kibler Field?

[fol. 69] A. Less than 100; I don't know the exact figures.

Q. I believe you stated that you are getting practically no gas out of the Kibler field now?

A. Yes, sir.

Q. You have had Mr. Gilbertson prepare a cost statement for you?

A. Yes, sir.

Q. Did you turn over to him all your books?

A. We did. He is our auditor. He has audited our books every year for a year or two back.

Q. Do you regard him as a competent accountant?

A. I do.

Judge Hill: I want to introduce a certified copy of an order of the County Court of Crawford County with reference to the use of roads for pipe lines, as part of Mr. McGehee's testimony. Is that a copy of it?

A. Yes, sir, that is a copy of it.

Q. Is that a copy of the order made on your application?

A. It is.

Q. State what date is shown there that it was made.

A. April 5, 1916.

(Said copy of order marked "Exhibit 5 (McGehee)" and filed.)

Witness: I believe you asked me about the rock pressure in the Kibler field. I stated that it was under 100 pounds. I can give the exact figures. It runs from 65 to 115 pounds, an average of 86 pounds.

Q. On what date was that?

A. January 12, 1920.

Q. The last reading of these wells?

A. Yes, sir.

Q. Coming back to this petition in the County Court: that had been pending some little time before it was granted?

A. Yes sir.

Q. How long, do you know?

[fol. 70] A. I think about sixty days, to the best of my memory.

Judge Mehaffy: We object to that, because the record will show the exact date. If they filed anything it was marked "filed" by the clerk.

Witness: Judge Scarborough was disqualified by being attorney for the company, and a special judge was appointed.

Judge Hill: One point I want to make: Was this not well known in that community and was there not some opposition to it?

Judge Mehaffy: We object.

Witness: I don't remember about the opposition.

Judge Hill: You do know it was pending some time?

A. Yes; if there was opposition I have forgotten it.

(Witness excused.) (Tr. 2-33.)

[fol. 71] J. F. McGehee recalled:

Mr. Daily: You introduced with your testimony a contract dated March 17, 1916, between the Clear Creek Oil & Gas Company and D. W. Kerr and H. S. Buck. That is the Fort Smith Spelter Company contract now?

A. Yes sir.

Q. It was assigned by Buck & Kerr to the Fort Smith Spelter Company?

A. Yes sir.

Q. And the gas furnished under that contract has been furnished by your company to the Fort Smith Spelter Company?

A. That is correct.

Q. At the time that contract was entered into on March 17, 1916, your company had no pipe line?

A. No sir.

Q. It had contracted for no pipe line?

A. No sir.

Q. It had one gas well?

A. That is correct.

Q. And leases on some 25 or 30,000 acres of supposed gas land?

A. That is right.

Q. And a great part of these leases have since turned out to be non-gas land?

A. Yes sir, correct.

Q. At the time you entered into that contract you were not selling gas to any person, firm or corporation?

A. We were not.

Q. At that time you had made no contract with any person, firm or corporation to sell them gas?

A. Correct.

Q. You have made a statement in your testimony with reference to securing a franchise from the town of Alma. You have never exercised any rights under that franchise?

A. We have not.

[fol. 72] Q. You have built no pipe line to Alma?

A. No, sir.

Q. You have not produced here a copy of ordinance passed by the proper officers of the town of Alma?

A. No sir.

Q. You also testified on direct examination with reference to having secured a franchise to furnish gas to the town of Clarksville. You have never furnished any gas to the town of Clarksville?

A. No sir.

Q. You have never done anything under that franchise?

A. No sir.

Q. You have never built any pipe line to the town of Clarksville?

A. No sir.

Q. You also testified in your direct examination with reference to having secured a franchise in the town of Conway. You have never constructed any pipe line to Conway?

A. No sir.

Q. You have never exercised any rights under that franchise?

A. No sir.

Q. You have never furnished any gas there?

A. No sir.

Q. As to both Conway and Clarksville, you have not produced ordinances passed by these towns?

A. We have not.

Q. You have introduced further in evidence a contract between the Clear Creek Oil & Gas Company and L. Vogelstein & Company, which bears date the 3rd day of May, 1916. That contract was assigned to the Arkansas Zinc & Smelting Corporation?

A. That is correct.

Q. It contains a provision on its face for such an assignment?

A. That is correct.

Q. The gas furnished under that contract has been furnished to the Arkansas Zinc & Smelting Corporation?

[fol. 73] A. That is correct.

Q. As a matter of fact the contract between your company and L. Vogelstein & Company was entered into on the 21st day of March, was it not?

A. I will have to—we have sent for that contract.

Q. You do know that your company and L. Vogelstein & Company did enter into a memorandum contract on or about the 21st day of March, don't you?

A. I think there is a memorandum contract, but the date I do not know.

Q. It was some time in March, was it not, 1916?

A. I could not say, but that is on file. If there is one, he filed it at Van Buren; he filed all his contracts there.

Q. You stated to me this morning that you knew there was a memorandum contract entered into prior to the contract you have introduced in evidence, didn't you?

A. That is what I stated.

Q. You know that is a fact?

A. That is my recollection.

Q. That memorandum contract provided for the drawing up of a more formal contract to be signed by all parties?

A. Correct.

Q. You know as a matter of fact that L. Vogelstein & Company, acting on that memorandum contract, started the actual construction of their smelter before the execution of the formal contract of May 3, 1916?

A. I don't remember the date they started construction, but you are probably right on that, but I do not know how long it was before this second contract was signed or whether it was before that or not.

Q. You made the statement that your pipe line cost you $165,000; is that a fact?

A. Yes sir.

Q. And the Arkansas Zinc & Smelting Corporation furnished you [fol. 74] $45,000 to construct that pipe line?

A. After it reached their smelter.

Q. But pursuant to their previous agreement?

A. That is right.

Q. What was the distance from the gas field at that time to the Arkansas Zinc & Smelting Corporation's smelter?

Witness: Do you want to know the distance we laid the pipe line?
Mr. Daily: Yes sir.

A. About 8 mles.

Q. The smelter of the Arkansas Zinc & Smelting Corporation was located outside the city limits of Van Buren?

A. Correct.

Q. And closer to the gas field than the city of Van Buren?

A. Correct.

Q. In other words, the pipe line as you finally constructed it, runs from the gas field to the plant of the Arkansas Zinc & Smelting Corporation and from there to the city of Van Buren?

A. That is correct.

Q. The plant of the Fort Smith Spelter Company is located outside the corporate limits of the City of Fort Smith?

A. Correct.

Q. What was the length of your pipe line, as constructed, from the Kibler Field to its terminus at South Fort Smith?

A. About 18 miles; that is from the extreme end of the line in the Kibler Field to South Fort Smith. It is between 18 and 20 miles; I will qualify that a little.

Q. When did you say you brought in the "Discovery" well?

A. In November, 1915.

Q. From November, 1915, to September 15, 1916, you had drilled 10 wells?

A. Correct; I think that is the right date.

Q. The initial well had an open flow of 12 to 13 million feet?

A. That is correct.

Q. That was the largest well of any of the 10, was it not?

[fol. 75] A. Yes sir.

Q. What did the other 10 wells run?

A. That ran from 4 to 12 million.

Q. And more ran 4 than 12, didn't they?

A. I think there was about an even break, about one and one.

Q. What was the rock pressure of these wells as they came in?

A. It varied from—I don't believe I can——

Q. Can you give me the actual figures on all these wells?

A. I think so. Some of these wells, when the first test was made, had been in some time. There was an average of 205 3/8 on August 19th; Kibler No. 1, 227; Andrews No. 2, 190; —— No. 4, 242; Hardin No. 6, 227; Montgomery No. 7, 256; Eugene ——, 250; ——, 249; and Wagner (?), 251. The Eugene — well was a little under 6 million; Montgomery No. 7 is 10,640,000; the Hardin was nearly 10 million—9,572,000; Andrews, 7,238,000, and Kibler No. 1, 7,941,000.

Comr. Brasher: What was the date of that test?

A. August 19, 1916.

Q. Did you get any dry holes during that period?

A. We got one hole that was practically dry, a well on —— Island.

Q. Have yo umade a test of these wells recently?

A. Yes sir.

Q. Can you give the amounts registered?

A. Yes sir.

Q. I would be glad to have that.

A. January 12th, Kibler No. 1, 65 lbs.; volume 684,720, less than 1 million; the D—— Goss (?) No. 4, 90 lbs. pressure, 2½ million feet; No. 6, Hardin, 60 lbs. pressure, 1,800,000; No. 7, Montgomery, 90 lbs. pressure, 969,840; Eugene—— No. 8, 65 lbs. pressure, 559,400 feet; No. 9, 68 lbs. pressure, 1,247,000; No. 10, Mills well, 71 lbs. pressure, 1,186,920. That was as far as we had drilled at that time. We have other wells in the old field drilled later.

Mr. Daily: At the time you gave the first pressure and first volume [fol. 76] in 1916, how much did your company owe?

A. I don't remember our indebtedness at that time.

Q. Can you get it?

A. We have it on the books.

Q. Will you get it?

A. It may be quite a little job to figure it out. If I am required to get it, I will get it up.

Q. Was your capital stock at that time the same as it is now?

A. It was.

Q. At that time you had issued 15,000 capital stock, against leases and you had issued $15,000 capital stock that had been paid for at par, and had issued $15,000 capital stock that had been paid for at 5 for 1?

A. Correct.

Q. Can you tell me now what your maximum indebtedness was at any time?

A. No sir, not without referring to the books.

Q. Will you get that for us?

A. If I am required to, I will.

Judge Mehaffy: I think that is very important.

Judge Hill: If you have trial balances for the first of any of these years I wish you would bring them over.

Judge Mehaffy: We don't want the balances, but we do want the maximum amount, because it shows whether they are making or losing money.

Comr. Wood: What do you mean by maximum amount of indebtedness?

Mr. Daily: I really should amend the question. I want to know the maximum amount of indebtedness that this company has ever had since it had a capitalization of $105,000, that is, $90,000 paid in in cash, and $15,000 in leases. They say they have never paid any dividends, and I want to show that they had a small amount of their own capital invested and that they materially reduced that, and that [fol. 77] they have actually made money. If you had $500 capital and $25,000 borrowed and at the end of two years you paid it nearly all off, even if you paid no dividends you have made money.

Mr. Daily: What I asked for was your maximum indebtedness at any time after that $45,000 had been paid into the company, and I want to know the date of that to compare your condition then with your condition now?

Chmn. Wilson: How long would it take you to get that?

Comr. Brasher: What date do you want this?

Mr. Daily: Any date after they paid the $45,000.

Chmn. Wilson: How long would it take to get that?

Witness: I don't know just how long it would take, probably not over an hour.

Chmn. Wilson: You can get it some time during the day, or tomorrow?

A. I can furnish it by that time.

Mr. Daily: After you contracted with the Ft. Smith Spelter Company and contracted with the Arkansas Zinc & Smelting Corporation, then the next person you contracted with or to whom you furnished gas was the Athletic Mining & Smelting Company, or Charles T. Orr?

A. Unless we made some contracts with small industries that might have been made in the meantime. I would have to look up those dates.

Q. The Charles T. Orr contract introduced in evidence was the contract with the Athletic Mining & Smelting Company?

A. That is right.

Q. In the Arkansas Zinc & Smelting Corporation contract you required them to agree that they would take their gas subject to the rights of the Ft. Smith Spelter Company?

A. Correct.

Q. It was at your insistence that that was written into the contract?

A. Correct.

[fol. 78] Q. When you contracted with Charles T. Orr, which afterwards became the Athletic Mining & Smelting Company, you required it to be written in that contract that his right to take gas was subject to the rights of the other two smelters in the order of their contract?

A. Correct. We did the same thing with the two glass factories.

Q. Each of these contracts contains a provision required by you that their right to take gas should be subject to the rights of those who had contracted ahead of them and it is so specified?

A. Correct.

Q. The two glass companies; they were not here when the Clear Creek Oil & Gas Company brought in their first well, were they?

A. They were not.

Q. They were brought here and their glass plants constructed just as the plants of these three smelters, at your solicitation?

A. Correct. As to solicitation, I think Mr. Orr and the Radiant Glass Company, I think we solicited them, but I think the other three drifted in here and looked us up.

Q. Is it not a fact that Mr. Kerr came here and looked the situation over and went back to Oklahoma and you went out there and got him?

A. No, I did not.

Q. Did not a representative of your company, Mr. Robertson——

A. At that time I was living at Alma. You can show that by Mr. Robertson.

Q. You do know, as a matter of fact, that he went to Clinton?

A. Mr. Robertson?

Q. Mr. Kerr; went to Clinton after he was here the first time?

A. No sir; the first time I met Mr. Kerr was when I came over here to sign the contract.

Q. Don't you know that Kerr went to Clinton, before you executed the contract, to look at the gas field there for the purpose of locating a smelter there?

A. No, I do not know that, but probably you are correct.

Q. You do know that at that time Clinton had gas fuel for sale [fol. 79] and they were selling gas?

A. I have heard that, but do not know it from actual knowledge; I never was at Clinton.

Q. Don't you know that at that time they were offering gas for sale at 3½ cents and that they are still selling it at that?

A. I have heard that.

Q. Your statement a while ago that the price of gas to smelters in Oklahoma was now 10 cents, that just referred to some smelters?

A. Yes sir, I said some smelters.

Q. The fact is they are furnishing gas to smelters at Clinton for 3 cents?

A. I do not know.

Q. As a matter of fact, you know just as much about the fact that they are selling gas there at 3 cents as you know about the fact that they are selling gas for 10 cents?

A. I have not heard of any instance where they are selling it at 3 cents.

Q. Your information is all hearsay, just what other people told you? You are not operating any gas field in Oklahoma nor purchasing gas from there?

A. No sir, I have not been investigating the gas fields in Oklahoma.

Q. You don't know anything about it except what you saw in the press and what people generally told you?

A. That is the idea.

Q. In the last 18 months, I believe you testified having drilled six wells, is that a fact?

A. In the last 18 months, no. I testified to more than that. Since we brought in that No. 1 well or the well in the Williams field we have drilled six more.

Q. When did you bring in the No. 1 well in what you call the Williams field?

A. In January, 1919.

Q. I don't believe you gave us the amount of that well?

[fol. 80] A. Yes sir, 7,100,000.

Q. With a rock pressure of what?

A. About 280 pounds.

Q. That was more than any of the original 10 wells you testified about?

A. Yes, the rock pressure.

Q. Then after that, from then until the present time you have drilled 6 wells?

A. That is right.

Q. And they had an open flow of 9 million feet, 12 million, 10 million, five million, 24 million and 8 million?

A. That is right.

Q. And all with a rock pressure of 280 pounds?

A. No, I did not say that.

Q. What was it?

A. This is the first record that I have here. Probably this record was made some little time after these wells were brought n. One was 240 pounds, one 230, one 250. These are the only three I have. It was running along that line.

Q. The 24-million foot well, that was the Bushmeyer well?

A. Correct.

Q. That is the biggest well that has ever been discovered by your company or any other company operating over there in the Crawford County field?

A. The report in the paper was that a well of 25 million feet had been discovered in that field.

Q. That, at least, is the biggest well you ever discovered?

A. Correct.

Q. When was that well brought in?

A. It was some time—I have forgotten the exact date, but it was not very long ago, not over three or four months.

Chmn. Wilson: That well, you say, is down to 2½ million now?

A. Yes sir; some fault in the packing, I think. We think that can be eliminated. We are fixing to put a derrick over it now and [fol. 81] pull the tubing and pack it.

Q. It has not gone down from use: you have had an accident with reference to that particular well?

A. That is our idea.

Q. Have you had accidents to wells before and been able to remedy them?

A. Nothing like that.

Q. Sometimes you are able to remedy them and sometimes you are not, is that it?

A. We have had no wells go down like that, I believe. Yes, we did, but we did not get it remedied. It was the Montgomery well. It went down rapidly and we bailed it out and cleaned it out, but we never got it back.

Q. As a matter of fact, the open flow of these 7 wells you have drilled comparatively recently is over 120 million feet?

A. I did not figure it up: you can make the calculation.

Q. It is the sum of the figures you have given?

A. If you will sum them correctly. That sounds a little big to me. I made it 75 million.

Mr. Daily: From the 10 wells back in 1916 you got 87 million feet; you testified to that, didn't you?

A. That is correct.

Q. You are getting a little better average now than you did then?

A. Yes sir, I think that's it.

Q. You were getting an average of 8 million and you are getting an average of 10 million feet now?

A. Little over 10 million now.

Q. You have spoken of the Williams and Kibler field. There is merely an invisible line that divides the two?

A. Yes sir. It is supposed there is a pool or some structure of the sand under the earth's surface that no man can see that divides them, but the line has been pretty well defined by drilling, but that is just a [fol. 82] geological question.

Q. Are they all in the same neighborhood?

A. They run right up to them. The closest wells we have found are ¼ to ½ mile apart.

Q. Between a quarter and a half mile you find a well and you call one a Williams and the other a Kibler?

A. The rock pressure shows one in the Williams and the other in the Kibler.

Q. You had leases, however, prior to Mr. Crow bringing in his first well in what you call the Williams field?

A. That is correct.

Q. These 7 wells you have drilled; did you have these leases at the time you made the contracts with these two smelters?

A. No sir.

Q. Tell us when you did acquire these leases?

A. After the Crow discovery was made, that is, some of the leases; we had some of the leases that we drilled these six on.

Q. Most of these leases you have acquired in the last 12 or 14 months?

A. Most of the acreage we have in the Williams field we have acquired since we made that deal with the smelters; we were very much discouraged.

Judge Mehaffy: We ask that that be excluded.

Witness: We had very little acreage at that time in the Williams field.

Chmn. Wilson: We ruled out of the testimony the 400 pages of the record.

Judge Mehaffy: I understood your Honors to rule that we would not go into whether or not we made a deal over there.

Chmn. Willson: In to that contract.

Judge Mehaffy: That is what he means by "deal."

Chmn. Wilson: Let it be excluded.

Witness: Then I will say since February 7, 1920.

[fol. 83] Mr. Daily: Then since February 7, 1920, you have acquired a majority of your leases in the Williams field and practically all these 7 wells were drilled on these new leases?

A. That is right.

Q. Was any money paid for these leases?

A. Yes sir.

Q. That money you had gotten from funds received from these other people?

A. We got that money by the directors endorsing the note of the Clear Creek Oil & Gas Company at the First National Bank.

Q. You mean money for drilling the wells?

A. Drilling the wells and getting the leases.

Q. You owe less money now than at any time you ever have?

A. I cannot say that; we owed a little more at one time.

Q. When was that one time?

A. Before we undertook this improvement. We owe more money now than we owed at the time we undertook this improvement.

Q. How much more?

A. About $10,000.

Q. So at one time your financial condition was $10,000 better than what is shown in the petition you filed with the Commission?

A. That is approximately correct.

Q. You have not had time yet since these new wells came in to pay off all the new indebtedness you acquired?

A. We have not paid it off yet; I don't know about the time.

Q. You are making some payments on your debts right along?
A. We are just getting that drilling done down there and had to pay out $2,000 for drilling about two weeks ago.
Q. You have just completed a well?
A. The second Bushmeyer.
Q. How large a well was it?
A. 5 million. I think we paid for the drilling alone in actual [fol. 84] figures $6,600, and in addition to that we had to have tubing, casing and things like that, which brought the cost of the well into the neighborhood of $10,000.
Q. You testified about making a contract with Mr. Cazort about drilling 3 wells, and you drilled them and he paid for them, and you agreed to pay 6 cents for the gas?
A. Correct.
Q. You testified that in your contract you were required to take 3 milliion feet?
A. If his wells developed that much.
Q. As a matter of fact you have never taken more than 1 million feet at any time since the wells were completed, have you?
A. I think so.
Q. What are you taking now?
A. About 1 million.
Q. Are you not taking 800,000 now a day?
A. It may be cut down to that at present, but the last record I had it was about 1 million. We are paying about $2,000 a month.
Q. I believe you stated that the consumption of the Ft. Smith Spelter Company is 3,800,000 feet a day?
A. Approximately.
Q. At a 10 cent rate that would be $380 a day?
A. Correct.
Q. They operate 365 days in the year, don't they?
A. I might state this, they have operated about that. They have been shut down a time or two.
Q. What I mean is, they operate on Sundays, same as any other day, Sundays and holidays, continuous operation?
A. Yes sir, if they are operating.
Q. And they operate day and night?
A. That is right.
Q. With some little variation they have practically a constant load all day long?
[fol. 85] A. I could not say that. I can show you one of their charts. We have one here.
Q. The amount they take each day is practically the same?
A. Correct.
Q. They take about as much in the summer time as in the winter time?
A. No, I think they would take a little more in the winter time because it take more to heat or melt the metal.
Q. It is reasonably constant?
A. That is right.

Q. 365 days at $380, that would be $138,700 a year from the Fort Smith Spelter Company?

A. If you have made the calculation correctly.

Q. The Arkansas Zinc & Smelting Corporation takes about 1,250,000 a day?

A. That is about right.

Q. How much did you say the Athletic Mining & Smelting Company was now taking?

A. It is less than 1 million; I am getting the figures.

Q. Will you get it for me?

A. I think Mr. Hume is here; probably he can give it to you.

Q. I would like to have it for the last year, up to the time of the hearing.

Chmn. Wilson: Get it for the year, up to the 15th of this month.

Mr. Daily: Did you not testify that the Glass Companies use 1,500,000 feet a day together?

A. Yes sir.

Q. Approximately, I would like to get the amount each of them takes a day.

A. I think it is about half a milion and about three quarters of a million. The half a million is the Radiant. No, about 600,000 and about 900,000.

[fol. 86] Q. 600,000 feet of gas a day for the Radiant and 900,000 feet a day for the Model?

A. We can get these figures exactly from the books.

Q. The Model Window Glass Company and the Radiant Glass Company, you have published a rate as to them of 10 cents; is that correct?

A. Yes sir.

Q. And you are now getting 10 cents?

A. Yes sir.

Q. And you are asking for no modification of that rate?

A. Correct.

Q. What period of time during the year does the Model Window Glass Company operate?

A. The Model operates I think about 3 or 4 months.

Q. Have they ever operated 3 or 4 months in a year since they have been here?

A. I think so.

Q. At one time?

A. Yes, sir; I think that is correct. 3 or 4 months.

Q. Then you have held and do hold your pipe line open to serve them? Is that correct?

A. I don't know that you can say we hold it open, because we have one other customer on the line that we can supply gas to when we have it.

Q. As a matter of fact you only sell them gas about 3 or 4 months in the year?

A. Yes, sir.

Q. And during the balance of the year your investment in the pipe line lies idle so far as they are concerned?
A. Unless we can sell to some one else.
Q. Your overhead goes on just the same?
A. Yes sir.
Q. Your lease money goes on the same?
A. Yes, all expenses go on.
[fol. 87] Q. During what period of the year do they operate?
A. They are operating at present. It might be they operate longer than that. We will get that from the books.
Q. As a matter of fact, they operate during the winter and fall, don't they?
A. Yes, they don't operate in the hot season.
Q. That is at the very time when all gas companies have a scarcity of gas, regardless of how much they have on top of the ground? In the winter months, regardless of how much gas comes to the top of the ground, and regardless of the rock pressure, there is always a certain amount of trouble due to friction in the pipe and sluggishness of the gas in flowing?
A. Yes sir.
Q. Glass Companies are not nearly as desirable customers as smelters from a financial standpoint?
A. That is correct.
Q. You referred to your salary as being $150 a month. You don't devote your entire time to the Clear Creek Oil & Gas Company, do you?
A. No sir.
Q. In fact, you devote a very small part of your time to the Clear Creek Oil & Gas Company during the cotton season?
A. No, I am on the job all the time with the Clear Creek Oil & Gas Company. Their business comes ahead of mine and when they have anything to attend to, I attend to it first.
Q. I am not saying this as a criticism. As a matter of fact, you are one of the largest cotton buyers in Fort Smith?
A. No sir.
Q. Do you do an extensive cotton buying business, or do you not?

Chmn. Wilson: Do you think that has anything to do with it?
Mr. Daily: I just want to show that he does not spend much time on the business of the Clear Creek Oil & Gas Company.
Mr. Daily: You are engaged in other lines of business?
[fol. 88] A. I am.
Q. Quite extensively?
A. I don't know what you call extensively. I might go into details and give you the figures.

Mr. Daily: I don't care for that.

Comr. Wood: Have you any idea what percentage of your time is given over to the affairs of the Clear Creek Oil & Gas Company?
A. No sir.
Chm. Wilson: You testified that a man occupying the position of

president and general manager of such a company ought to receive $5,000 a year; did you mean to say give all his time to the business?

Witness: I understood that other companies here were paying about that much for a general manager who did not give all his time to the business. That is what I based that on; I might be wrong in that understanding.

Mr. Daily: That is just supposition on your part; you don't know that of your own knowledge?

A. That is just from hearsay, that's right.

Q. As a matter of fact, since you have gone into the question, you don't devote anything like the time to the Clear Creek Oil & Gas Company that Mr. Martin does to the Wild Cat?

A. I think I do.

Q. Don't you know that as a matter of fact for the last two years he has not done anything else but attend to the Wild Cat's business?

A. I understand he has quite a law practice. I know that we have a good deal of business and I look after it carefully for the Clear Creek Oil & Gas Company and give it first call on my time on all occasions.

Q. Outside of the 5 people, the 3 smelters and the 2 glass companies, how many other industrial consumers have you at the present time?

A. Industrial consumers, we have 9, including a gin that is down in the Kibler field; that does not do much; you might say 8.

[fol. 89] Q. Take these industrial consumers up in order and give their names and the amount of gas they take each day, or per month if it is so small that you cannot give it by the day?

A. We will furnish you those figures from the books.

Q. All of these customers, with one exception, you have taken on since the shortage of gas in 1918 that you testified to?

A. No sir.

Q. I understood you to say that you had cut off everybody except those that were protected by injunction or by war orders?

A. That is correct. The Best-Clymer Manufacturing Company was on.

Q. Didn't you ever cut the Best-Clymer off?

A. No, they get a small amount of gas now that has never been cut off.

Q. Their injunction expired?

A. Yes sir.

Q. You did not cut them off?

A. No sir.

Q. The Equitable Powder Company have been taking gas from you continuously since you first began to furnish them. What are they paying you for gas?

A. They are paying us, I think, about 6 cents, and we are holding our rights to 15, 13, 12 and 10 cents.

Q. You are accepting 6 cents from them every day?

A. As settlement on account.

Q. They are paying it and you are accepting it?

A. On account. That is the way we issue our receipt, on account, and not a settlement in full.

Q. That is all they have ever paid you, at the rate of 6 cents?

A. It is all they have ever paid on account.

Q. How long have you been issuing that kind of a receipt?

A. I cannot give you the exact date, but I think it is 10 or 12 months, ever since they refused when we advanced the rates.

[fol. 90] Q. You have never brought it to an issue?

A. No sir.

Q. And the courts are open?

A. We have the amount charged up to them at the 15, 13, 12 and 10 cent rate. They have been paying at the rate of 6 cents.

Q. They take a very small amount of gas per month?

A. At present they do, but when they are running they take a good deal of gas. They are not manufacturing powder now, just using it to keep fires in the office.

Q. As compared with any one of these smelters, they take a trivial amount all the time?

A. Yes sir, their account runs 4 or 500,000 a month, if you call that trivial when they are running the powder plant at full blast. As to whether that is trivial, you can pass on that.

Q. The other industrial consumers, outside of the Best-Clymer Manufacturing Company and the Equitable Powder Company you have taken on since you began development in the Williams field?

A. When I get that list and run over it I can answer you more fully, but I think you are correct.

Q. All of your testimony relative to prices of gas in Kansas and Oklahoma are based on hearsay?

A. Correct.

Mr. Daily: At this point we desire to move to exclude all his testimony relative to prices for gas in Kansas and Oklahoma, in view of his statement that it is based on hearsay.

(Motion overruled and exceptions saved.)

Witness: You were asking for that Athletic statement. I have it now.

Mr. Daily: You now have the statement with reference to gas furnished to the Athletic Mining & Smelting Company during what period?

A. The year 1919, from January 1, 1919, to March, 1920, inclusive.

Q. Have you it listed there?

[fol. 91] A. Yes sir.

Q. Let me see it, please.

Q. The statement I now hand you is a correct statement given me by the bookkeeper.

Mr. Daily: We will offer that in evidence and let him read it.

(Statement read by witness, marked "Exhibit 6 (McGehee)" and filed.)

Q. From March to November they were firing their boiler only; that is what this statement says?

A. That is correct.

Q. They were taking about 150,000 feet a day at that time?

A. That is right.

Q. From the financial standpoint of your company, they are not as satisfactory a customer as the Fort Smith Spelter Company or the Arkansas Zinc & Smelting Corporation?

A. No sir.

Q. They have never taken a constant amount?

A. That is right.

Q. Originally they did take all their supply of gas from you?

A. As long as we were able to supply it, and when we were not they contracted for a supply from the Poteau field.

Q. You are now able to supply them?

A. I think we could at present.

Q. You have stated heretofore, haven't you, that you did not take on any more customers after developing in the Kibler field until you had a sufficient amount of gas to supply the three smelters and both glass companies their full requirements as originally——

A. Yes, but you are speaking of two different times. You asked me just now about the present time, and that was at a time some time ago that we took on these other customers.

Q. It is still true?

A. What?

[fol. 92] Q. That you can still supply them?

A. I think we could; I would have to make a calculation on it.

Q. In addition to your company there are other gas companies supplying gas to industrial concerns in and around the city of Fort Smith and Van Buren?

A. Yes sir.

Q. The Twin City Pipe Line Company, which gets its supply from the Industrial Gas Company and the Wild Cat Oil & Gas Company, also supplies industrial lines?

A. Yes sir.

Q. Were you before the City Council of the City of Van Buren at the time the question of granting a franchise to the Clear Creek Oil & Gas Company was up?

A. I was.

Q. Didn't you state, or rather representatives of your company state, to the City Council of the City of Van Buren that you did not care much whether they gave you that franchise or not, that it was really an accommodation to them, and that you had made your plans so that you could lay your pipe line direct to the smelter of the Arkansas Zinc & Smelting Corporation and across the river to the smelter at South Fort Smith?

A. I don't remember that statement, but I know that we made concessions to them of 10 cents; that is, concessions in the price of gas in Van Buren, in order to get that franchise through.

Q. You did consider that, going first to the smelter of the Arkansas

Zinc & Smelting Corporation and straight across the river to South Fort Smith and not go through Van Buren at all?

A. I remember thinking of that and probably discussed it.

Q. And openly stated it?

A. I don't remember.

(Witness excused.) (Tr., 35-60.)

[fol. 93] J. F. McGEHEE, recalled by petitioner, testified as follows:

Judge Hill: Mr. Daily asked you to give the initial volume of all the wells in the Williams field. I wish you would give the present volume of your wells in the Williams field?

A. About 50 million; no, that includes—it is not that much in the Williams field.

Q. You testified that all together it was about 75 million.

A. That was approximately correct.

Q. Give us the present volume; give that in detail.

A. Estimating that last well, the Bushmeyer well, at 5 million feet—I haven't the exact figures on that—it was 34,018,320 ft. as of January 12th.

Q. As against 75 million?

A. Approximately 75 million originally.

Comr. Brasher: What was the original date of the 75 million?

A. They were drilled this year at different dates.

Judge Hill: You were giving Mr. Daily your data from the Kibler field and you would show some of the wells down there at 50 or 60 lbs., and would show some million or million and a half feet of gas. Was that available gas? Would that be available to you?

A. No sir; a small percentage would be available, a very small percentage. Some of the wells would put in some at times and at other times would not put in any.

Q. Without pressure from the Williams field there would not be much available?

A. There would be a small amount that would go through the lines.

Q. But as a commercial proposition it would not be available?

A. We would be out of the gas business.

Q. About the Best-Clymer Manufacturing Company and the Equitable Powder Company, each of these companies claimed that you did not have the right to put them off the line?

A. Yes sir.

Q. You had litigation brewing with them is the reason nothing [fol. 94] has been done?

A. Yes sir.

Q. The Best-Clymer Manufacturing Company has been paying at the rate of 15, 13, 12 and 10 and paying it under protest each month, and the other people are paying 6 cents and you are accepting it under protest?

A. Yes sir, accepting it on account.

Q. These new consumers you referred to, you took on a few; that was after you got a surplus in these new wells in the Williams field?

A. That was a surplus over the requirements of the 5, the two glass factories and the three smelters.

Mr. Daily: Do I understand that you have 34,180,000 feet of gas on top of the ground in the Williams field?

A. 34,018,320.

Judge Mehaffy: Judge Hill asked you a moment ago if those companies did not claim you did not have the right to cut them off and you said they did make that claim, and you claimed you did have the right?

A. Which companies do you refer to?

Judge Mehaffy: To the same ones that Judge Hill asked you about?

A. That was the Best-Clymer Manufacturing Company and the Equitable Powder Company.

Q. You have made the claim all the time that you had the right to cut them off?

A. Yes sir.

Q. Your petition states that when you made these contracts with these companies that your object was to induce concerns of that sort to come to Fort Smith, was that true?

A. Which companies do you refer to, the ones we were cutting off?

Q. The Fort Smith Spelter Company and this other company represented by Mr. Daily?

Witness: That their contracts with us was their inducement to [fol. 95] come to Fort Smith?

Judge Mehaffy: I said, you state in your petition that you endeavored to induce factories to come to Fort Smith. Is that true, that you were endeavoring to induce the Ft. Smith Spelter Company and Mr. Hothorn's company to come here?

A. Correct.

Q. And you made that contract with them, thereby inducing them to come?

A. Correct.

Q. You made another with Mr. Kerr of the Ft. Smith Smelter Company when you saw they were figuring on going elsewhere?

A. I was not here at the time they were figuring that matter. The first time I came over was to sign up the contract.

Q. But that is your information?

A. Yes sir, hearsay.

Q. All that you have testified to about gas anywhere except your own gas here is hearsay?

A. That is right.

Q. You don't know a thing, of your own knowledge, about it?

A. That is right.

Mr. Daily: The original test that you made of these wells in the Williams field that you say showed 75 million feet, and the tests that you have made now, were they taken through the same size casing?

A. I cannot say about that.

Q. It would make a very material difference in the open flow as to whether the pipe is now smaller than that, would it not?

A. We have a table of calculation that we figure that by.

Q. Don't you know that it was larger then and smaller now; that is, that you took it before it was cased in?

A. No, I cannot say that.

Q. You don't know that it was not so?

A. No sir.

Q. The man who took both tests is here—Mr. Hume?

[fol. 96] A. Yes sir.

Q. And he can testify accurately on that fact?

A. Yes sir, I think he can.

Q. You consider him to be competent?

A. We have him here for that job.

Judge Hill: I forgot to ask you about the volume and rock pressure of the Cazort wells. Have you those measurements?

A. I have.

Q. Will you give them to the Commission?

A. What time?

Q. What they came in at and what they are now?

A. The last test I have a record of is January 1st.

Q. Give the first test first. I don't want you to repeat it if you have already given it.

Witness: I did not give it this morning what they are at the present time.

Chmn. Wilson: Give the last time?

A. 5,194,080 feet.

Q. That was in the Kibler field?

A. This is in the Williams field; the Cazort wells are in the Williams field. Total, 5,194,080 feet on January 12, 1920.

Judge Hill: What did they come in at?

A. About 10 million.

Q. They are about 50 per cent off in volume?

A. Yes sir.

Q. Have you got the rock pressure on them, what they came in at and what it is now?

A. This does not give the rock pressure as to this last test; it gives the volume.

Mr. Daily: I would like for you to separate the Cazort wells?

A. No. 1, 1,118,180 feet; No. 2, 2,658,720 feet; No. 3, 1,416,480 feet. That is at present.

Q. What were they when they first came in?

[fol. 97] A. I gave you that this morning.

Q. I would like to have it now?

A. About 4, 4, and 2.

Q. Don't you know that when they were taken when they came in it was the open flow?

A. No, I was not there.

Q. Don't you know, are you not so informed, that he took that

from an 8 or 6 inch pipe and that now you have them cased in with 2 inch pipe?

A. I don't know how he took them when they first came in and I don't know that these figures are correct.

Q. All these figures are Mr. Hume's figures?

A. These figures are the ones Mr. Hume made and turned in to me.

Q. You don't know anything about them at all?

A. I know that I have the record and I believe it is a correct record. Mr. Hume turned it in to me.

Chmn. Wilson: Are you willing to testify that they are a correct record?

A. They are a correct record as turned in to me.

Judge Hill: This is your log of your wells that you hold in your hand?

A. It is the record that Mr. Hume turns in to me when he makes the tests.

Q. That is the original record?

A. Yes, sir.

Mr. Daily: Do you know what that purports to show with reference to volume?

A. It purports to show the open flow of the wells in each instance.

Q. If you have an 8 or a 6 inch casing that the gas is coming out of, that figure will be greater in the same well than for a 2 inch casing?

A. I think so.

Q. So the variance may be accounted for by the fact that you have [fol. 98] put in 2 inch casing which restricts the flow of the gas?

A. If it was taken through larger pipe at the time. I think both of these tests were made after the wells were closed in, but when Mr. Hume goes on the stand he will tell you exactly how he made them.

Comr. Brasher: I believe you stated that when your original contract was entered into with the Fort Smith Smelter Company you had no pipe line and only one well flowing?

A. That is correct.

Q. Did your contract with this company provide that they were to have the exclusive use of the gas from that field, or did it give you the privilege of extending your operations and to serve other people in addition?

A. It did, but they were to have the first call on that gas. If there was just enough gas to supply them, they were to get it all, but we could sell as much other gas as we had to sell.

Q. Have there been any objections made by this company to your extensions and accepting franchises in different towns and serving different consumers other than at the time when your flow ran low and you cut the people off that you enumerated?

A. No sir.

Judge Hill: They had full knowledge of what you were doing?

A. Yes, sir. There was a time when we were excluded from doing that, that agreement in Chancery Court when we agreed not to serve anybody but the 5, but that has been excluded.

Q. That was in February, 1919, you are referring to and Mr. Brasher was asking about the original contract.

A. There was nothing in the original contract that prohibited it.

Comr. Brasher: I am asking about the original contract and serving different people at different times?

A. There was only one instance where they claimed that, and that has been excluded.

Judge Hill: When they claimed that it was from that time on and not prior to that?

[fol. 99] A. From that time on.

Mr. Daily: We made that claim on the proposition that you had agreed in your contract to give them the first call on the gas and they made the contention at the time because they exceeded it about —, and you got into Chancery Court over the contract which gave them the first call on the gas, and you had written that into subsequent contracts as you made them with the Arkansas Zinc & Smelting Corporation, with the Athletic Mining & Smelting Company and with the Model Window Glass and Radiant Glass Company?

A. The original contracts made with the five carried their pro rata and this agreement reached over here on February 7, 1919, did not change any particular of that existing contract other than the price of gas and priority which affected the Athletic Mining & Smelting Company.

Judge Mehaffy: Judge Hill asked you a while ago if they did not know everything you were doing; who knew it?

A. If the Fort Smith Smelter Company knew we were selling other people?

Q. They did not know anything about your franchises?

A. They are a matter of public record.

Q. They are matters of public record, but do you know any Fort Smith concern that knew anything about them when you made this contract?

A. The papers were full of it.

Q. Answer the question.

A. The papers were full of it. We hired Mr. Hardin, I believe it was, to go and get these franchises.

Q. Was that prior to the contract with the Fort Smith Spelter Company?

A. That was afterwards.

Q. So when you made the contract with them you did not have any franchises at all?

A. I believe we hired Mr. Hardin before we made the contract with them.

[fol. 100] Q. They did not know anything about it?

A. I do not know.

Q. You talk about the papers being full of it; Buck & Kerr were not here, were they?

A. At what time?

Q. Here at the time you made the contracts?

A. Yes sir.

Q. And left immediately?

A. I do not know.

Q. They don't live here?

A. No sir, they live in the North somewhere.

Q. When you made that contract, the Commissioner asked you if they agreed to take all your gas. They did agree to take a certain amount and you agreed to that?

A. I don't think the Commissioner asked me that question.

Q. Whether he did or not, I am going to ask you. They did agree, and you agreed to furnish them the amount specified in that contract?

A. They agreed to take it and we agreed to furnish it, provided the wells made it.

Q. You further agreed that you would give them that full quantity before you would sell any to anybody else at all?

A. No, I don't think that was the agreement. I think you will find the agreement to be this: that if we did sell to anybody else, they were to have first call on our gas, and if we had only enough to supply them, then we were not to supply anybody else. We had a right to sell it; they did not bind us not to sell it.

Q. They bound you not to sell any at all until they got the entire amount they contracted for?

A. No sir, they were to have first call on what gas we had.

Q. Don't first call mean that?

A. You can draw your own inference.

Q. Up to the time you made the contracts with the smelter companies you were not serving anybody but them?

[fol. 101] A. We were not selling any gas or delivering to anybody any gas at the time we made those two contracts.

Q. Not delivering any at all?

A. We had no pipe line.

Judge Hill: You said "these two," but Mr. Mehaffy's question would embrace all three. The Athletic Mining & Smelting Company's contract was later than that?

A. No, we were delivering you people gas when we made the contract with Orr.

Judge Mehaffy: That was the third contract you made?

A. Some of these smaller contracts with these small industries around Fort Smith, furniture factories, etc., may have been made at the time we made the contract with Orr. We can get the dates and give them to you.

Chmn. Wilson: With reference to these 5, that was the third contract?

A. Yes sir.

Judge Mehaffy: Orr's contract as well as Hothorn's was subject to that of the Fort Smith Smelter Company's, was it not?

A. That is all in the contracts and they have all been put in here.

Mr. Daily (reads Clause 13 of "Contract" or "Agreement" between Clear Creek Oil & Gas Company and L. Vogelstein & Company, as follows):

"Inasmuch as the rights of parties of the second part to receive gas from party of the first is subject to the provisions of a contract entered into between the Clear Creek Oil & Gas Company, and D. W. Kerr and H. S. Buck, on the 17th day of March, 1916, and to the end that there may be no misunderstanding between the parties hereto, as to the terms of such contract, it is agreed between the Clear Creek Oil & Gas Company and L. Vogelstein & Company that the certified copy attached hereto is a true and correct copy of a contract between Clear Creek Oil and Gas Company and D. W. Kerr and H. S. Buck, and that the right of L. Vogelstein and Company to [fol. 102] receive gas from the Clear Creek Oil & Gas Company is subject to the terms set out in said certified copy of a contract, and is not subject to the terms of any other contract or contracts which may be entered into."

Mr. Daily (reads Clause XVII of the above mentioned contract, as follows):

"It is further agreed between the parties hereto that all subsequent sale of gas or contracts for such sale, made by party of the first part, shall be subject to the terms and provisions of this contract; it being expressly understood and agreed that these provisions and all of the terms of this contract shall be binding upon the successors, assigns, and mortgagees of the first party, and any and all persons, firms or corporations having any claim *of* interest in or lien upon the gas producing properties herein mentioned or the pipe line herein contracted for."

Judge Mehaffy: You, Mr. McGehee, were trying to get a market for your gas as well as locate factories at Fort Smith?

A. Yes, sir.

Q. For the purpose of getting a sale for your gas you made these contracts?

A. Yes sir.

Mr. Daily: With reference to the question of one of the commissioners: The same thing was true with reference to the Arkansas Zinc & Smelting Corporation, at the time you entered into a contract with them you were not selling gas to any one else and did not have any pipe line to deliver gas to anyone else?

A. Yes sir.

Q. You made the contract with them before you had ever sold a foot of gas, except the contract you had entered into with the Fort Smith Spelter Company?

A. Yes sir.

Q. They agreed in that contract and did furnish you under that contract $45,000 to build your pipe line?

A. No, they helped pay for it after we built it.

[fol. 103] Q. That is what enabled you to finance it?

A. As a matter of fact, I think we could have financed it without them.

Q. From the time that Mr. Hothorn was down here on the 21st of March and signed the original memorandum contract, he was

never here in Fort Smith or Van Buren until long after the smelter was constructed and gas was being delivered, was he?

A. I do not know.

Judge Hill: How much of a pipe line, what size pipe line, would have been required to deliver gas from your field to Mr. Hothorn's smelter at Van Buren, and fill his requirements under your contract?

A. I believe we could put it through a 2 or 3 inch line.

Q. His contract set forth that you were to build a 10 inch line?

A. Yes sir. Mr. Hume could come nearer giving you that information than I can.

Q. Your contract, as I read the 6th Article, provided that you were to build a 10 inch line?

A. Yes sir.

Q. Did Mr. Hothorn know at the time he advanced you this $45,000 that you were going to build a ten inch line into Fort Smith, South Fort Smith?

A. He bound us to build it.

Q. He knew it at the time he advanced you nearly one-third of the money to build the pipe line?

A. More nearly one-fourth.

Q. To build it?

A. Yes sir.

Q. The amount he advanced would have been more than sufficient to build a pipe line to serve him?

A. Yes, a good deal more.

Q. Messrs. Kerr & Buck knew at the time they entered into the contract with you that you were going to transport gas from the Kibler field to their place?

A. Yes sir.

[fol. 104] Q. Mr. Orr knew at the time you had already built a pipe line when he contracted?

A. Yes sir.

Q. In these contracts that you had with those other customers—the Best-Clymer Manufacturing Company and Equitable Powder Company—did you have any priorities in them?

A. There was no express priority, but we had a right to cut them off in the event of a decline in the volume of gas that we had.

Q. It was an entirely different contract from those that have been put in evidence here?

A. Yes sir.

Q. I believe the Best-Clymer contract got before the court?

A. Yes sir.

Q. And Judge Youman held that you could not cut them off?

Mr. Daily: We object to that; the record is in there to prove it.

Judge Hill: You called for the original contracts with the two glass companies this morning. I have them now and wish to introduce these.

Witness: This is the contract with C. P. Zenor, now the Model Window Glass Company. (Marked "Exhibit 7 (McGehee)" and

filed.) I said this morning that this other contract was made with J. S. Parke. It is the Tulsa Glass Company. (Marked "Exhibit 8 (McGehee)" and filed.)

Judge Mehaffy: You say that these contracts are different and give you the right to cut them off; that was because these others had a prior call?

A. That was our standard form of contract for small consumers. I think we copied the Light & Traction Company's contract. We used a copy of their contract.

Q. Didn't you tell them that they had to come off because of those priorities?

A. That we ordered them off? Correct.

[fol. 105] You testified to that before?

A. On account of the decline in the pressure of the wells out there that we did not have enough gas to take care of these prior contracts.

Q. You were under contract to furnish gas to the others and would have to cut them off unless you had sufficient gas?

A. That was not the grounds to cut them off, but was what forced us to exercise our rights under the contract. We exercised our right under our contract with them to cut them off when the gas in the wells declined.

Q. So that you could not fulfill all those contracts?

Q. No, we exercised our right under the contract to cut them off.

At 5:00 P. M., the Commission adjourned until 9:00 A. M., April 20th.

Adjourned Hearing

April 20, 1920.

The Commission convened at 9:00 A. M., this date, in the Federal Building at Fort Smith, and resumed the hearing of this cause, pursuant to adjournment.

All parties were in attendance as on the previous day.

J. F. McGehee

Mr. McGehee resumed the witness stand.

Judge Hill: Mr. Daily asked you yesterday to ascertain the greatest amount of indebtedness which your company ever had, and the date thereof; have you done so?

A. I have.

Q. Have you the amount of it and the date?

A. Yes sir. In November, 1917, $131,351.43. I arrived at that by deducting at that time the cash we had in the bank and what was owing us for the sale of gas for the previous month that had not been [fol. 106] collected. The total amount was about $150,000 at that time. The net amount was $131,351.43.

Q. Mr. Daily asked you to bring in a list of the consumers out-

side of the 5 large consumers and the amount of their consumption for the month of March, 1920; have you that?

A. Yes sir. I stated the other day that we had 9 industrials on the line; in reality there are only 7. There are three furniture factories down there which belong to Mr. Ballman, which is one concern, and we are furnishing gas to them under three separate contracts. The Arkansas Coffin Company's average daily consumption is 17,800 feet, average daily for the month of March. The Ballman-Cummings Furniture Company average daily 45,786 feet. The Best-Clymer Manufacturing Company averaged daily 23,586 feet. The Equitable Powder Company, 162,600 feet; the Fort Smith Chair Company, 34,357 feet; the Ft. Smith Couch & Bedding Company, 39,786 feet; Goodnow-Ward Furniture Company, 58,536 feet; the Mo.-Ark. Cotton (?) Company, 3,000 feet.

Q. What is the total for the month?

A. 382,751 feet.

Q. Less than you estimated it yesterday when you said about half a million?

A. Yes sir.

Q. I want you to make a little clearer the statement you made a moment ago. You have 9 industrial customers?

A. 8. There is one gin in the field not using anything.

Q. That is a gin?

A. Yes sir; I think they gin about 100 bales of cotton.

Q. You have 8 industrial customers outside of your 5 contracts?

A. Yes sir.

Q. Two of those, the Equitable Powder Company and the Best-Clymer Manufacturing Company you have the controversy with?

A. Yes sir.

Q. After you got this surplus of gas, the pleadings state you took on 3 or 4 customers. It seems to be 6 as I understand your explana-[fol. 107] tions. Now, you made one contract with Ballman for the furniture concerns which he controls?

A. Yes sir, it was written up in separate contracts.

Q. And we were technically in error in saying 4 if you made Mr. Ballman's in three parts?

A. Yes sir.

Q. Which are the 3 Ballman contracts?

A. The Ballman-Cummings Furniture Company, Ft. Smith Chair Company and Ft. Smith Couch & Bedding Company.

Q. Which one did you make the contract with?

A. The Ballman Company.

Mr. Daily: May I look at your memorandum?

A. Sure.

Mr. Daily: What you have just given the Commission in your testimony that you have just given in chief is the average daily consumption of each of these industries?

A. Yes sir; I gave you the average daily consumption of each one and the total of them.

Q. You also have on the list or memorandum to which you referred

the total consumption of each of these concerns for the month of March and the total of that, haven't you?

A. Yes sir.

Q. Will you hand that exhibit to the stenographer and let him identify it?

(Statement marked "Exhibit 9 (McGehee)" and filed.)

Q. You referred to the Ballman contract. As a matter of fact you have contracts with each of these concerns, have you not?

A. Correct.

Q. And each of these contracts run for a definite specified term?

A. No sir, it does not.

Q. It does not?

A. No sir.

Q. I will ask you if it is not a fact that the Best-Clymer Manufacturing Company's contract expires in about a year from now?

[fol. 108] A. In this way: It does not run for a definite time. At any time the flow of the wells decreases we have the right to cut them off. We are not bound to furnish them gas for any specified time.

Q. What I mean is: You have a written contract with the Best-Clymer Manufacturing Company, signed both by them and by you, which states in its face that your obligation to furnish them gas will cease in about a year from this date?

A. I think that is correct.

Q. The same thing is true with reference to the Equitable Powder Company?

A. I think you are right on that. We can produce those contracts.

Chmn. Wilson: Aren't these contracts on file?

A. No sir.

Q. Don't you think they ought to be? That is the best evidence.

Comr. Wood: What is the object of the cross-examination?

Mr. Daily: To show this, that they are not dealing with these people as a public service corporation; that they made specific contracts with them as they did with us, specifying the length of time and conditions under which they would serve them.

Comr. Wood: If the Commission has jurisdiction of this rate, they would still have a right to make contracts subject to the police power and approval of this Commission. They always make a contract subject to the reserved right of the State.

Mr. Daily: My idea of this evidence is simply this: As a matter of fact when they contracted these people were not in any sense a public service corporation and never since that time have they held themselves out to the public nor served any particular portion of the public in the way that a public service corporation would serve any particular part of a community.

Mr. Daily: After you got this surplus amount of gas you entered into new contracts with the Ft. Smith Chair Company, Ft. Smith [fol. 109] Couch and Bedding Company, Goodnow-Ward Furniture Company, Mo.-Ark. — Company, Arkansas Coffin Company, Ball-

man-Cummings Furniture Company, and each of these contracts were signed by those customers and by the Clear Creek Oil & Gas Company?

A. No sir; I think that is correct with the exception of the Arkansas Coffin Company. I don't believe we have a contract with them. I think we just furnished them gas and made a memorandum of it. I can find out by calling the bookkeeper. There might be a contract. Mr. Hume says he fixed up the contract.

Q. So you have written contracts with all of them?

A. Yes sir.

Q. And each of these written contracts, and each of these contracts limits your liability to furnish gas to them to a definite period of time, does it?

A. I think you are correct on that but I would have to refer to the contracts to know exactly, but speaking from memory I will say you are correct.

Q. I believe you stated yesterday that the Equitable Powder Company were actually paying you 6 cents for gas furnished them?

A. I said they were tendering us that and that we were receiving it on account.

Q. Is that true of the Best-Clymer Manufacturing Company?

A. No sir, they are paying the full amount but under protest.

Chmn. Wilson: What are they paying you?

A. 15, 13, 12 and 10 cents.

Mr. Daily: Then all these people about whom you have testified are all paying this according to a graduated scale, are they?

A. With the exception of the Equitable Powder Company.

Q. I want to know what that scale is.

A. For the first 300,000 it is 15 cents, that is, of the monthly consumption.

Q. Of any month?

A. Any one month. The first is 15 cents; the next 300,000 is [fol. 110] 13 cents, the next 300,000 is 12 cents and the balance is 10 cents.

Chmn. Wilson: Are these rates on file with the Commission?

A. Yes sir.

Comr. Brasher: Is that true of the smelters also, the first companies?

A. No sir, I am just speaking of the small companies.

Q. What does the smelter pay?

A. They are paying 4 cents.

Mr. Daily: As a matter of fact, you had agreed with each of these people, in a written contract, to furnish gas at those prices quite a while prior to filing any rates with the Corporation Commission?

A. I will say that is true with 6. There are two, I think, that we haven't a contract with at this price; the contract is an old contract.

Q. That is right too, the Equitable Powder Company and the Best-Clymer Manufacturing Company, who have contracts for 6 cents?

A. Yes sir, but I think they were all made before April 1st.

Q. It developed in your testimony yesterday, which I did not understand before, that not only the consumption of the Glass Companies does not run regularly, but also that the consumption of these industrial consumers does not run regularly; is that a fact?

A. The Best-Clymer Manufacturing Company varies considerably. They have about 3 or 4 months in the year when they have a heavy run, when the sorghum crop comes in. Of course that is not reflected in this March consumption.

Q. Will you furnish the Commission with a statement of the amount of gas you have furnished the Best-Clymer people during the year 1919 and bring it up to the date of filing this petition, up to the first of March, 1920?

A. Yes sir, we will do that for you.

Q. The Equitable Powder Company, didn't I understand you to say that was also true of them?

A. What?

Q. That the amount they took varied?

A. Yes, when they are not running.

[fol. 111] Q. You did state that they were not running full time now?

A. Yes sir.

Q. Will you furnish to the Commission and attach as an exhibit to your testimony a statement of the amount of gas taken by them for the year ending March 1, 1920?

Chmn. Wilson: Why not have him furnish a list of all these and shorten the record?

Witness: He understands that the furniture factories run about the same.

Mr. Daily: I will ask you to furnish to the Commission a statement of the amount of gas received by each of your industrial consumers who have been taking gas for a year for the year ending March 1, 1920, and the amount of money that you received from each of them for that period; and that for the balance of your industrial consumers you furnish a statement showing the amount of gas which has been taken by them since they entered into a contract with you or resumed taking gas from you, or began taking gas from you, down until March 1, 1920.

Witness: Make that more specific. Do you want the Glass Companies as far as they run back, all the time that we have been furnishing them, and the smelters all the time we have been furnishing them?

Mr. Daily: I want this: I don't want anything with reference to the smelters. You have already furnished it with reference to the Athletic Mining & Smelting Company?

A. Yes sir, for a certain period of time.

Mr. Daily: And we have it with reference to the other two smelters. I want you to have them furnish a statement of the amount of gas furnished to each of the Glass Factories for the year beginning March 1, 1919, and ending March 1, 1920; the gas furnished,—and

the total amount of money received for the same. Then I want the total amount of gas furnished to the Best-Clymer Manufacturing Company and the Equitable Powder Company for the same period and the amount of money received for the same. I will ask you whether you have been furnishing the other industrials as long as a year? Have you?

A. I think that with the exception of the Mo.-Ark. and the Ar-[fol. 112] kansas Coffin Company we have.

Q. Then I want the same information for each of your other industrials that you have been furnishing for a year, and if they have not run a year, state when your period begins.

A. All right.

Q. You testified something yesterday with reference to a 10 inch pipe line. What is the capacity of your 10-inch pine line to deliver gas at South Fort Smith?

A. Under what pressure?

Q. Under the pressure that you have now?

A. The pressure now is an average of about 170 lbs.

Q. Do you know that?

A. Not exactly, but we have a table.

Q. Can you refer to the table and tell?

A. I think so or you can do it.

Q. It is delivered at 10 pounds pressure; that is your contract?

A. It is not calculated at 10 pounds. 14,908,000 at 5 lbs. pressure, discharge pressure.

Chmn. Wilson: That much passed through your 10-inch main every 24 hours?

Q. Yes sir.

Mr. Daily: That is with a 5 lb. pressure at the end of the line, and what pressure at the wall?

A. No, that is 175 lbs. in the line.

Q. Where it is put in the line?

A. No. That is, you might say, an average.

Q. As your pressure decreases your ability to deliver gas through that 10 inch line decreases?

A. Yes sir.

Q. You made some statement yesterday about being able to deliver gas to the Arkansas Zinc & Smelting Corporation through a 3-inch pipe, didn't you?

A. Their requirements, yes sir.

[fol. 113] Q. At the time you entered into that contract with the Arkansas Zinc & Smelting Corporation you were under contract to deliver as much as 12 million feet to the Ft. Smith Smelter Company?

A. If they required it.

Witness: If they should build their plant to capacity.

Q. They had not started to build at all at that time?

A. No sir.

Q. And you could not deliver 12 million cubic feet of gas to the

Ft. Smith Smelter Company and at the same time deliver gas to Mr. Hothorn under his contract with you through a 3 inch line?

A. 12 million and his requirements?

Mr. Daily: Yes.

A. No sir.

Q. You could not get 12 million cubic feet of gas through a 3 inch line to South Fort Smith at all under any pressure?

A. No sir.

Q. You have never transported gas through your pipe line except such gas as you yourself have developed?

A. No, we bought gas.

Q. You bought some gas and sold it, but you have never transported any gas for others?

A. No sir.

Q. And you have never offered to do so?

A. While I cannot say, I believe we offered to do so.

Q. Have you ever?

A. Yes sir.

Q. To whom?

A. Mr. Cazort.

Q. When?

A. In the last three weeks.

Q. Have you the proposed contract that you offered to Mr. Cazort to transport his gas?

A. No, I haven't it.

[fol. 114] Q. Can you get it?

A. Yes sir.

Q. Will you produce it?

A. Yes sir.

Q. That was done in the last three weeks?

A. Yes sir.

Q. That was since this matter was set down for hearing?

A. Yes sir.

Q. That is the only time you have ever offered to do it?

A. Yes sir.

Q. But prior to that time, as a matter of fact you had refused to do it, hadn't you?

A. No, I cannot say that I did.

Q. Hadn't anybody ever requested you to do it before?

A. I think we discussed that with Mr. Orr at one time but it never resulted in a deal.

Q. Hadn't Mr. Cazort tried to get you to transport gas for him prior to that time?

A. No sir, it was only recently that he had gas to transport.

Q. Didn't the Ft. Smith Light & Traction Company, during the cold weather two years ago, try to get you to transport some gas for them from the Kibler field?

A. No sir, they had none in the Kibler field then. They were buying gas from Mr. Crow.

Q. Didn't they try to get you to transport some of that gas to Ft. Smith?

A. I have no knowledge of it. They got some gas from us at that time.

Q. In giving your maximum indebtedness you made certain deductions for cash in the bank and gas sold but not collected for, that a fact?

A. Yes sir.

Q. You have also previously given the amount of your indebtedness at the time the petition in this matter was filed?

[fol. 115] A. That is correct.

Q. Did you in giving the statement of that indebtedness deduct the amount of cash you had in the bank and the accounts receivable that you had at the time Mr. Holt (?) made that statement up? Do you know?

A. No sir.

Q. Do you know what amount of cash you had in the bank and what amount of money you had coming from gas sales?

A. No sir.

Q. But you will furnish it?

A. Yes sir.

Judge Hill: I forgot to ask you that yesterday.

Mr. Daily: In the statement you made in your petition you did not take into acount the amount of cash you had on hand or the accounts receivable for gas sold. I want you to furnish that information and the offer to Mr. Cazort.

Judge Hill: Mr. Daily asked you yesterday about the run of the Zenos Glass Plant, which you put at a few months?

A. I said 3 or 4 months, but it has been determined at 17 weeks.

Q. What is the run of the Radiant Glass Company?

A. They run practically the whole year, day and night.

Q. They consume gas, day and night, whether they are running or not?

A. They have to keep their kilns hot. They shut down practically. I have heard one statement, six weeks in the summer and another 3 or 4 weeks—somewhere between 3 and 6 weeks each summer to repair the kilns.

Q. They still take gas during that time?

A. They practically do not take any at all for a short time, but as soon as they get the kilns repaired they have to start heating them and get them heated to the proper temperature before the run starts.

Q. That interruption is a small matter?

A. Yes sir.

Q. About these contracts with the Equitable Powder Company and [fol. 116] the Best-Clymer Manufacturing Company, they were made early in your operations?

A. Yes sir, when the field was first brought in; about the time the smelter contract was made.

Q. Is it not a fact that the method by which the Equitable Powder Company is now paying 6 cents on account was arrived at between your attorney and the attorney for the Equitable Powder Company to save litigation at that time?

A. That is correct.
Q. Without any prejudice to either party?
A. Yes sir.
Q. That is an attorneys' agreement that these payments should be made pending adjustment or litigation, without prejudice to either party concerned?
A. We have that agreement in writing.

Comr. Wood: What was the dates of these agreements with the Best-Clymer Manufacturing Company and the Equitable Powder Company that Judge Hill referred to?
A. The original agreement? About the time we made the contracts with the smelters, in 1916.
Q. Spring or Summer of 1916?
A. Some time during that year.

Chmn. Wilson: When you made that agreement with these people, did you have a written contract with the Best-Clymer people?
A. Yes sir.
Q. Was the rate fixed in that contract?
A. Yes sir.
Q. What was the rate?
A. I am not positive, but the Best-Clymer was practically 6 cents and the other people 5 or 6.
Q. The Best-Clymer was 6 cents, and then you later increased the rate to them?
A. Yes sir.
Q. Is that in your contract?
A. No sir; we notified them that they would have to pay an increase.
[fol. 117] Q. You notified them that you could not serve them any more at 6 cents? When was that, do you remember?
A. It was along in the summer of 1919.

Judge Hill: Didn't you notify them that you could not serve them at all?
A. That was before the discovery of the Williams field that we notified them that we could not serve them at all and they got out an injunction and stayed on our line. After we discovered the Williams field we notified them that the rate would be increased.

Chmn. Wilson: Was that after your rates were filed with the Commission?
A. That was before.

Mr. Daily: But as a matter of fact you did continue to serve them, didn't you?
A. Yes sir.
Q. You have never ceased to serve them?
A. No sir.
Q. And the Equitable Powder Company has continued to pay 6 cents?
A. As stated.
Judge Hill: Mr. Daily asked you about the contracts with these

new customers that you took on or the renewal of old relations after you cut them off. I will ask you if you had a form of contract prepared for all of them?

A. Not at that time; we had our old forms, prepared when we first went into the gas business.

Q. You have a form contract?

A. Yes sir.

Q. I will ask you if that contract is the same as any other contracts used here; is anybody else using that kind of contract?

A. Yes sir, the Ft. Smith Light & Traction Company, and, I understand, the Twin City Pipe Line Company.

Q. I will ask you if this is the form of that contract?

A. It is.

Mr. Daily: We would like to have the originals of all those contracts. I have seen them and they do not follow that form.

[fol. 118] Chmn. Wilson: Let them be filed. If they are printed forms, I don't see how there can be any variance.

Judge Hill: You say this form was copied from the Traction Company's form?

A. Yes sir.

Q. And you understand that the Twin City Pipe Line Company has the same form?

A. I have understood that.

Q. You stated a few moments ago that the only proposition you had ever made about transporting gas was recently to Mr. Cazort. Didn't Mr. Parks and Mr. Carney have up a proposition with you when you were short on gas in 1918 to procure gas and get you to transport it?

A. It was discussed with them. I also stated we had the matter up with Mr. Orr at one time.

Q. Did not you offer Parks & Carney that if they would get gas you would transport it for them on a transportation charge?

A. That is correct.

Q. Do you remember when that was?

A. I believe it was in 1918.

Q. Didn't Parks & Carney deal with Mr. Cazort?

A. They went to see him.

Q. And they failed to buy Mr. Cazort's gas?

A. Yes sir.

(Witness excused.) (Tr., 63-93.)

[fol. 119] Pursuant to adjournment, the Commission reconvened at 1:30 p. m.

J. F. McGehee, recalled by Judge Hill, testified as follows:

Judge Hill: You called my attention to the fact that you probably made an inaccurate statement about the cost of new wells. Have you got the actual cost of these in the Williams field?

A. In my statement, I believe it was yesterday. I intended to cover the costs of the well and the connecting of it on to the line, which is a different proposition from the actual cost of the well. The six last wells we drilled in the Williams field, I have 5 of them and one I haven't got, No. 19 was $6,875.78.

Q. What about No. 18, was that in the old field?

A. This is recent drilling after the advance in prices. No. 18 was drilled under an old contract we had with Van Sickle.

Q. How much was it?

A. $4,957.45.

Q. Practically $5,000?

A. Yes sir. No. 20 was $7,457.35; 21, $6,216.06; 22, $6,607.92; 23, $5,762.51.

Q. Making the average right at $6,000?

A. It will average considerably above $6,000. I haven't got the figures on our No. 24, but I have just paid Mr. Thompson for the drilling; I gave him a check for $6,660.00. That well will cost in the neighborhood of $8,000. That does not include connecting into our main line. We have spent, I guess, $12 or $15,000 connecting these wells in.

Q. It depends on the distance from the main pipe line?

A. Yes sir.

(Witness excused.) (Tr., 134.)

[fol. 120] J. F. McGehee, recalled by Petitioner, testified as follows:

Judge Hill: You remember that $15,000 expense?

A. Yes sir. After we had organized this company and drilled 1 or 2 wells, or 3 wells in the Kibler field, we had the idea that there was gas all over this country; the geologists led us to believe there was. We went down on the anti-cline to —— and took about 12,000 acres in there, 3 or 4,000 around Dripping Springs and in the —— Hill country. That was the expense of procuring these leases reflected in this statement.

Q. Did you ever have an estimate made on the cost of a compressor station to handle the Kibler field?

A. We did.

Q. How much was it?

A. $75,000, for all the wells we had in operation.

Q. That was in the Kibler field?

A. Yes sir.

Q. How long ago was that that you had that estimate?

A. It was in the year of 1918, I think, or close to the year 1918.

Q. Could you make anything like a guess of what it would cost now?

A. I judge from the way other materials have advanced that it would probably be $125 to $150,000.

Q. You have not had any recent estimate?
A. No sir.
Judge Mehaffy: Who made you that estimate?
A. Mr. Hildebrand of the Hope (?) Engineering Company.
Q. You say you thought there was gas all over the country and you were investigating and charging that up as part of the cost of production, securing leases, $18,000?
A. I did not say it was $18,000.
Q. What else went into it, into that item of cost of production, what was the amount?
A. I do not know.
Q. Approximately?
[fol. 121] A. I could not say.
Q. Can you tell from the books what that item of $18,000 is?
A. Mr. Gilbertson can tell you.
Q. Will you have that done?
A. Yes sir.
Chmn. Wilson: There were some exhibits that you were to file. Have you gotten them up yet?
A. I have part of them here and part of them we have not completed yet. They asked for the consumption of the two glass factories. I have that ready.
Chmn. Wilson: File that as an exhibit.

(Marked "Exhibit 9 (McGehee)" and filed.)

Mr. Daily: I hand you what purports to be a copy of a memorandum agreement between G. T. Cazort and the Clear Creek Oil & Gas Company. Is that the contract you have offered to Mr. Cazort since the petition in this matter was filed?
A. This is a copy of it.

(Marked "Exhibit 10 (McGehee)" and filed.)

Judge Mehaffy: You heard Mr. Gilbertson testify fixing the value of your physical property at $50,000. Have you been offered right recently $250,000 for your physical property?
A. I haven't got that offer with me. I think it was an offer of $250,000 without taking on our debts.
Q. You were offered $250,000 for your physical property?
A. Yes sir, Mr. Hothorn made that offer on Saturday afternoon. We have it under consideration.
Q. This is the first time you have had it?
A. Yes sir, that is the first time we had that offer of $250,000 for the physical assets.
Q. You have had an offer of $400 a share for the stock for several months?
A. Not for several months. I think it was made about 3 or 4 weeks ago. That is my recollection of it.
Judge Hill: That was $250,000 less the debts?
[fol. 122] A. We had to pay all of our debts and claims against the company.

Chmn. Wilson: Have you had time to consider it?

A. I told him we would be in this case until next Monday and that as soon as we got out of the case I would lay it before the Board.

(Witness excused.) (Tr., 195-197.)

The Commission adjourned at 5:00 p. m., with the understanding that the hearing would be resumed at a date and place to be agreed upon later, and that counsel on each side would be granted five days in which to file briefs covering arguments with reference to the jurisdiction of the Commission.

[fol. 123] J. F. McGehee, witness for Petitioner, recalled, testified as follows:

Judge Hill: I call your attention to the schedule of rock pressures in the Kibler field, found on page 4. That shows the lowest rock pressure there was in any one well to be 65 lbs.?

A. That is correct.

Q. And the highest one seems to be 115?

A. That is correct.

Q. How are these operated, and what, if any, gas in that 65 lb. well would get into your line?

A. It takes 75 lbs. pressure on the line to supply our customers in Ft. Smith and South Ft. Smith, and it takes on an average about 25 lbs. greater pressure at the well to hold that gas up to 75 lbs. at the line. It takes about 100 lbs. pressure to hold the gas up to 75 lbs. in the line at the field station. If a well drops under 100 lbs., then it won't put gas in against that 75 lbs. at the field station.

Q. Have you any meters on your individual wells?

A. We have on a few in the Williams field, none in the Kibler field. Yes, we have two meters on wells in the Kibler field.

Q. Does that meter reading corroborate what you have stated from your knowledge of operating conditions?

A. Yes sir.

Q. If it drops under 100 lbs. it will not put gas into the well?

A. No sir.

Q. I suppose that varies owing to the distance of the well from the line?

A. Yes sir; it may build up and put a small amount of gas into the line and drop back.

Q. If your idle well builds up a small amount?

A. Yes sir, one closed in by not having enough pressure to keep the valve open. The line pressure pressing against these valves closes it, and it does not put any gas in until the pressure builds up to over-[fol. 124] come the line pressure.

Q. Would the restriction on the 20 per cent of the open flow enter into that proposition?

A. Yes sir.

Q. Explain that.

A. That is, as against the average rock pressure?

Q. Yes.

A. If we take an average rock pressure in the Kibler field, if we undertook to take 20 per cent of the open flow in the Kibler field we would have to pull some of these wells much over the 20 per cent.

Q. Would it pull it unless it had that rock pressure behind it? Take that well at 65 lbs.?

A. It would not put anything in at all.

Q. Take one at 115 lbs.?

A. It would put some gas in.

Mr. Daily: It is your theory, you so testified, that the gas in the Kibler field is absolutely separate from the wells in the Williams field, so far as one interfering with the other is concerned?

A. Yes sir; the two fields are separate and the gas does not pass through the sand from one field to the other.

Q. You have taken gas out of the wells in the Kibler field after they reached 100 lbs.?

A. Yes, if there is no heavier pressure on the line.

Q. In other words you are testifying now that you cannot take it under 100 lbs. now because you have pressure from the Williams field in the line?

A. Yes sir.

Q. That pressure from the Williams field would back up to the pressure in the Kibler field, but if you haven't got the Williams wells on the line, you can continue to take gas from the Kibler field a long time?

A. No, I should not think so.

Q. You did do it quite a while, didn't you?

A. No, we did not; our pressure had not fallen. I think it was operating a little better than 100 lbs. when the Williams field was [fol. 125] brought in.

Q. Have you got the records here on that?

A. No sir.

Q. At the time you brought in the Williams field the rock pressure was operating at better than 100 lbs.?

A. At the time it was around 100 lbs.

Q. And it is now down to 60 in the Kibler?

A. No sir.

Q. That is one well?

A. No, there is 3. There are two other companies operating there.

Q. Haven't you taken any gas out?

A. Very little, if any.

Q. The reason you haven't done it is because you had gas in the Williams field?

A. Because we could not maintain the pressure on the line at 75 lbs. To keep that pressure on the line it shuts the Kibler field out.

Q. You have never had any trouble delivering gas to the Arkansas Zinc & Smelting Corporation; you have delivered gas without any trouble and had plenty of pressure?

A. Yes sir.

Q. There never has been a time when the gas outside of their regulator has not stood as high as 35?

A. I don't know how the regulator stood, but they have had gas from us at all times.

Q. There never has been a time when you have not been able to supply gas at the window glass factory in Ft. Smith?

A. No sir.

Q. At the time—they did operate at South Ft. Smith, all the time?

A. Part of the time they were closed down for want of gas.

Q. The whole thing?

A. Part of the plant.

Q. One block?

[fol. 126] A. I think more than that, about 50 per cent of their capacity.

Q. And at that time they were taking gas out ahead of them at the Arkansas Zinc smelter and the glass factory?

A. Yes sir.

Q. You did not try to find out whether you could deliver gas at South Ft. Smith with the others cut off?

A. They were never cut off.

Comr. Wood: When did the first well come in in the Williams field?

A. It was the first part of 1919, in January, 1919.

Q. This gas all goes into the main line, that one to the Kibler field, too?

A. We just have one line, and the Williams field is connected by a line that runs north from the wells. The Williams field is south of the line, of our main pipe line, but it runs right through the heart of the Kibler field.

Q. How far is the industry of the Arkansas Zinc & Smelting Corporation from the field?

A. You will want that from the center of the field? About 7 miles from the center of the Kibler field.

Q. How far is the window glass factory?

A. Between 4 and 5 miles further along the line.

Q. Intermediate, between——

A. South Ft. Smith and the Van Buren smelter, about half way between.

Mr. Daily: You say the well came in in the Williams field in January, 1919?

A. Yes sir.

Q. You did not get connected until about May, did you, with the Williams field?

A. We connected that up pretty soon after it came in.

Q. You remember the hearing in Chancery Court was in February?

A. February.

Q. You were not connected at that time?

A. I rather think that well was connected then.

[fol. 127] Q. It was brought in before that hearing?

A. Yes sir, in January. That well is not far away, on the north edge of the Williams field, not far from our pipe line.

Comr. Wood: That is what you call Well No. 18?

A. Yes sir.

Q. How long was it after you brought in Well No. 18 that you brought in well No. 19?

A. It was about 90 days, to the best of my recollection. I haven't the records on it here; it may have been 120 days,—90 to 120.

Q. And well No. 20?

A. It was started about the same time as 19. I believe No. 19 got in a few days earlier.

Judge Hill: You remember them from the time you started them?

A. Yes sir.

Mr. Daily: When did you bring in No. 22?

A. That was brought in about two or three months later than that.

Q. When?

Comr. Wood: After 21 and 20?

Mr. Daily: Give it as near as you can?

A. I haven't the dates with me.

Q. That is the Bushmeyer well, is it not?

A. I would say along in June, May or June.

Q. About a year ago?

A. Yes sir.

Q. About six months after No. 18?

A. Hardly six months; I think about three months; yes, about 6 months after 18.

Q. And about a year ago you brought in No. 22? It came in with an original rock pressure of 285 lbs.?

A. That is in the neighborhood of it.

Q. The same as No. 18?

A. Practically the same.

Q. You have been pulling from 18, 19 and 20 all of that period?

A. No, not all of that.

[fol. 128] Q. You have been pulling from 18 about 6 months, and the others came in about 90 to 120 days later. It came in with the same pressure as No. 18?

A. Yes sir.

Q. It was the biggest volume you have ever gotten?

A. That is corect.

Comr. Wood: How far is well No. 22 from well No. 18?

A. In the neighborhood of 2 miles.

Judge Hill: I want to develop a little more clearly to the minds of the Commissioners the physical stiuation out there. In the Kibler field itself there are three companies altogether operating?

A. There are three pipe lines drawing gas from there.

Q. That is the Twin City, the Crow and yourself?

A. Yes sir.

Q. Are the wells pretty close together there?

A. Yes sir, in both fields.

Q. Is not the compressor and pumping station in that field? Where is that located?

A. It is off-setting our Hardin well about 600 feet.

Q. That is the one Mr. Martin testified about?

A. Yes sir.

Q. What I want you to bring out is, how many wells have you that are close around that pumping station?

A. 3 or 4.

Q. Is that affecting the rock pressure?

A. Yes sir; these wells are pulled down, that is, the ones further removed. They are the ones that have the lowest rock pressure, the wells that are being pumped.

Q. Taking it from that area, the Arkansas Zinc & Smelting Corporation is about how far?

A. 7 miles.

Q. Then from the Arkansas Zinc to the two glass factories?

A. About 5 or 6 miles.

Q. And how far from there to South Ft. Smith?

[fol. 129] A. 7 or 8 miles.

Q. Making a total distance of about 20 miles?

A. Yes sir.

Q. In referring to the 100 lbs. pressure you were speaking about operating conditions under your contracts to deliver gas at South Ft. Smith.

A. Delivering it at 10 lbs. there at South Ft. Smith.

Q. That is what your contract called for?

A. Yes sir.

Q. You could deliver gas under that at the Arkansas Zinc and the Glass Factory?

A. Yes sir.

Q. For awhile?

A. Yes sir.

Mr. Daily: You know it has been down at the South Ft. Smith smelter plant to one-eighth of a pound?

A. Yes sir.

Q. As a matter of fact, they cut the gas down to something like 1 lb. before they use it?

A. Yes, they reduce it, and keep it as a reserve on the outside.

Q. But at one pound pressure they could operate at full capacity?

A. I don't believe they could operate at peak load. They might do it at 2 lbs.

Judge Hill: They prefer you furnish it at 10?

A. That is the contract.

Comr. Wood: It might not be just pertinent here, but I notice a cost item that enters into the well No. 13. Do you remembr why putting down that well cost so much more than all the rest of the wells?

A. I remember it very distinctly. We had a fishing job for about six months in that well and had a hard time. We drilled it ourselves, undertook to drill the well and get it cheaper.

Q. You didn't get it much cheaper?

[fol. 130] A. No sir.
Q. You didn't get it when you got it?
A. No sir.

(Witness excused.) (Tr., 232-240.)

[fol. 131] D. W. KERR, witness for petitioner, after being duly sworn, testified as follows:

Judge Hill: What is your connection with the Ft. Smith Spelter Company?
A. I have no connection with it at present.
Q. What was your past connection?
A. President and Treasurer.
Q. Were you President and Treasurer at the time or date of that statement?
A. Yes sir.
Q. Look over it and state whether or not it is a correct statement.
A. I could not say.
Q. That is the year ending December 31, 1918. You have your books here, have you not?
A. No sir, they are not here, I don't think.
Q. Can you verify that?
A. No, sir, I could not verify that because it is unsigned and I cannot recall the figures.
Q. That purports to be a copy and I want to know if it is a correct copy.
A. I cannot say.
Q. Who connected with your Company can say?
A. I don't suppose anybody can here, for I don't think the books are kept here.
Q. Do you know whether this is approximately correct or not?
A. I really could not say.
Q. Have you any means of finding out?
A. I have no authority, of course, now, and I would not have any means.
Q. Don't your books here show anything about it?
A. I have not been connected with the Company for about a year [fol. 132] or nine months.

(Witness excused.) (Tr., 149–150.)

[fol. 133] D. W. KERR, witness for respondents, after being duly sworn testified as follows:

Judge Mehaffy: Where do you live?
A. Warren, Ohio.
Q. With whom was the Ft. Smith Spelter Company contract, the contract that has been introduced here, made. It was made by you and signed The Fort Smith Spelter Company?

A. Mr. H. S. Buck and myself.
Q. When did you visit Ft. Smith?
A. The early part of March, 1916, the first time.
Q. What was your purpose there; what did you go there for?
A. I came here to investigate gas. Do you want me to relate how it came up?
Q. I wish you would.
A. I was down at Clinton, Oklahoma, investigating that field and made some progress towards writing up a contract. We heard of gas in Ft. Smith. We came over here and saw Mr. Echols; a real estate man took us to see Mr. Echols. He talked rather discouragingly and said they did not have any gas, and we were about to leave the city when Mr. Robertson and Mr. Speer met us just as we were going to take the train to Muskogee, and they said they had gas. I did not pay much attention to it at the time, because I had not done much drilling. We went to Muskogee, and a day or two later I think Mr. Robertson or Mr. Speer called me on the telephone and wanted us to be sure and consider their proposition before closing. I told them we would. They finally came over and got me at the hotel. Mr. Robertson and Mr. Sperr, representing the Clear Creek Oil & Gas Company——
Q. Came where?
A. Muskogee. I came back with them and after possibly a day or two closed up the contract.
Q. Is that the contract that has been introduced here providing [fol. 134] for gas at 4 cents?
A. Yes sir.
Q. State whether or not you could or would have located a smelter at Fort Smith if you had not got a contract for four cent gas?
A. Yes sir, we would. We were offered lower priced gas there.
Q. Where?
A. At Clinton, Oklahoma.
Q. You would have located there, rather than Fort Smith if you could not have gotten a four cent contract at Ft. Smith?
A. Yes sir, in fact, we made a contract for four cents. I think they were to guarantee the freight rates equivalent to Checotah, Oklahoma.
Q. Clinton did? At any rate, you would not have located at Fort Smith but for the four cent contract?
A. No sir.
Q. Do you know of your own knowledge whether or not it has been a paying proposition all the time for the smelter companies there at four cents?
A. No sir, there has been a number of months in which we could not figure any profit; that is, we could not allow for any depreciation on the plant. The spelter market fluctuates greatly. We would make a fairly good profit one month and next month may be not anything. It is like the New York stock market so far as the price is concerned.
Q. It is very much like gas?
A. More so.

Q. You are not connected with the smelter company or either of them?

A. No sir.

Judge Hill: Didn't you figure on going to Checotah?

A. We figured on Clinton and Checotah. Clinton is the place we would have gone. A. A smelter located at Checotah about that time.

[fol. 135] Q. Wasn't it before, and hadn't it been shut down for about a year for lack of gas? It has not been running for three or four years?

A. I don't know.

Q. Didn't they run about a year and quit?

A. I don't know that they did.

Mr. Daily: Do you know whether or not a smelter was located at Clinton about that time?

A. Yes sir, we recommended that the people built a smelter.

Q. It is still running too?

A. Yes sir, they have a very good gas supply.

Q. And a 3½ cent price?

A. Either 3 or 3½.

Q. They are still running?

A. I think they are.

Judge Hill: You stated awhile ago that some months you operated there would not be any profit. You- company has not operated at a loss at any time?

A. Yes sir.

Q. Have you operated any year at a loss?

A. I won't say a year, but there have been months that we did not make any profit.

Q. That never extended into a year, did it?

A. I don't think that any fiscal year we showed a loss, but we would have if we had charged the proper depreciation.

Q. Your statements don't show a loss for any year you have operated?

A. Including depreciation, they show a loss.

Q. How are you trying to depreciate, on the life of the field?

A. No, we cannot afford to figure around so.

Q. How do you figure it?

A. I don't think we figure any depreciation, but just set up a sort of reserve at the end of the year.

Q. Reserve for depreciation, is it not?

[fol. 136] A. We set up an arbitrary reserve.

Q. To cover depreciation, to take care of the life of the field?

A. I don't know—the life of the smelter.

Q. That is dependent on the field?

A. Yes sir.

Q. It is practically the same proposition?

A. It is cumulative. Yes, it would include both, but we don't take the field into consideration.

Comr. Wood: What length of time do you figure the average life is?

A. In the first place, based entirely on the field, it would be—also there is wear and tear, the same as anything else—I think probably five or ten years. I don't know what they do figure.

Q. Do you set aside any percentage for depreciation figured on that average life?

A. We don't really figure it that way. In good many of our profit statements we don't show any depreciation.

Q. How do you set aside your reserve for depreciation at the end of the year?

A. It is an arbitrary amount, depending on what we made that year. If we had a good year we would probably set aside more; if a poor year, probably not so much.

Q. You take what you have over operating costs and put in the reserve?

A. Yes sir, just keep it out of the surplus. I don't know just how the books do stand on that.

Q. Were you ever interested in the actual operation of a smelter in the Fort Smith territory?

A. I was active in the Ft. Smith Smelter up until a year ago.

Q. Then you were interested in the operation of that company?

[fol. 137] A. Not in the operation here at Ft. Smith. I was President of the Company; I was not located here.

Q. You had an interest in the company being operated at Fort Smith?

A. Yes, sir.

Comr. Brasher: You cannot state what the earnings of the plant has been up there each year?

A. No, I cannot state that, in fact, I do not know since a year ago what it has been, and at that time if we took off depreciation it would depend on how much we made?

Q. How much did yo utake off each year?

A. It was a arbitrary amount each year; I do not recall the total that was in the depreciation account; in fact, I don't know whether we actually had any set up in our books.

Q. You don't know whether the company paid a fair return and a sufficient amount for depreciation or not?

A. The first year we did all right, but after that the spelter business got pretty poor. A year there I don't think we made anything.

Q. Do you know what you did the first year?

A. No, sir, I don't recollect what we did make actually the first year. That was our best year and there hasn't been anything like it since. It was when the war was on and high prices were prevailing at that time.

Judge Hill: Are you familiar with the smelter at Clinton, with its operation?

A. I am not very familiar.

Q. Do you know that the Oklahoma Commission increased the price of gas there to eight cents?

A. No, sir.

Q. And it went out and drilled its own wells and got its own gas supply?

[fol. 138] A. I heard that they had gas wells of their own.

Q. They went to drilling after the Corporation Commission increased the price of gas to eight cents?

A. I don't know.

Q. I will call your attention to this statement of your Company under date of December 31, 1918, put in the testimony here. Doesn't that show a surplus for that period of $210,849.04?

A. I don't know whether it is our statement or not.

Q. Assuming that it is your statement, that is what it shows?

A. That is what is marked down.

Q. Don't you think that is a correct statement of your Company?

A. No, I cannot say, because it is not signed.

Q. There is no depreciation carried in that, is there?

A. No, sir.

Q. Did you pay any dividends during that period?

A. We paid dividends. I think during the first few months.

Q. How much dividends did you pay?

A. I think we paid all together about ten per cent.

Q. You have been carrying it in the surplus since?

A. I imagine that is where it is carried, what we made.

Judge Mehaffy: How much did you invest in that smelter, do you know, all together?

A. Around $300,000.00.

Judge Hill: This carries, "Plant, $298,255.82; Furniture and Fixtures, $1,084.82," making a total of $299,310.64. Do you think that is correct?

A. I think about $300,000.00 is right.

Judge Mehaffy: That statement was shown you at Ft. Smith. You know nothing at all about it?

A. No, sir, I don't know anything at all about that statement.

[fol. 139] Q. The Commissioner asked you about the life of the plant. Is there any salvage value of a smelter if the field plays out?

A. I understand there is very little, depending on whether you can get gas some place else. It has to be made into a gas smelter and you would have to have natural gas to do it and would have to get it at the right price.

Comr. Wood: Is there anything to prevent that plant from being moved from one location to another where there is a gas field developed?

A. No, sir, but the cost is very much in labor. I don't know how it would work out. I understand it would cost about as much to move it as to build it.

Judge Hill: A great deal of brick goes into the construction of it?

A. Yes, sir.

Q. There would be a salvage value in that?

A. Yes, but it would have to be torn down.

Q. Brick is worth a great deal more now than when you built that smelter?

A. I think that is true.

Comr. Brasher: If your company had been required to pay 8 or 10 cents, as requested by the Gas Company, for fuel, do you think that would then have been a good investment over there?

A. No, sir. A great many months the plant would not have run if they had had to pay a rate like that?

Q. Taking the business up to the present time, are you in a position to say that it would not have paid?

A. I know this; I would not build a smelter with eight or ten cent gas. I would not think of putting money into it. You have a double risk in the smelter business; you have the risk of the gas playing out as well as your own risk in the business. I could have gotten gas at any number of places when we built that [fol. 140] smelter.

Judge Hill: Any places you can get it at that now?

A. I haven't made any investigation recently, but I think so. In Louisiana I had an offer of two cents for all the gas we wanted.

Comr. Brasher: That would be subject to the same conditions possibly that prevail in this territory; if they found that the rate was too low and the Commission had the right to change it, the rate would be changed?

A. I suppose it would. We would have to take a chance on having a contract I suppose.

Comr. Wood: From your knowledge of operating conditions do you think that gas can be produced now per thousand cubic feet for what it could in 1916?

A. I think that depends on a lot of things. I would not be in a position to answer that. Of course, when they started out they only supplied us three or four million feet a day.

Q. Do you think it can be produced for what it could in 1916, from an economic situation?

A. I suppose costs have gone up in building. Whether that would be offset by furnishing a greater supply I do not know.

Q. Your position is, regardless of whether the cost has gone up, a contract has been entered into with this Company and they ought to be required to fulfill that contract?

Judge Mehaffy: He has no position at all.

Comr. Wood: And he would not care to make any statement about it? Who is President of the Ft. Smith Spelter Company?

Witness: Mr. Martin—C. W. Martin.

Q. Is he here?

A. No, sir.

(Witness excused.) (Tr., 277-285.)

[fol. 141] E. E. Buck, witness for petitioner, after being duly sworn, testified as follows:

Judge Hill: What relation do you bear to the Fort Smith Smelter Company?

A. Vice President.

Q. You have been Vice President since its organization?
A. No, sir, since May, 1917.
Q. Are you in charge of the business at Fort Smith?
A. Yes, sir.
Q. And have been since that time?
A. Yes, sir.
Q. I will ask you to look at this copy and see if it is a correct copy, if you have any information on that subject?
A. I have no knowledge, Judge.
Q. You keep your books here?
A. No, sir. This is merely the manufacturing end.
Q. Have you copies of statements made by your Company in your office?
A. No, sir.
Q. Do you know anything about the financial affairs of your Company?
A. No, sir.
Q. Nothing at all?
A. No, sir.
Q. You are Vice President and General Manager?
A. Yes, sir.
Judge Mehaffy: Of the manufacturing end?
A. Yes, sir. The books are kept in Greencastle, Indiana.

(Witness excused.) (Tr., 150-151.)

[fol. 142] Earl E. Buck, witness for respondents, after being duly sworn, testified as follows:

Judge Mehaffy: You live in Fort Smith?
A. Yes, sir.
Q. Give the stenographer your name?
A. Earl E. Buck.
Q. You are not the Buck who was with Mr. Kerr when the contract was made?
A. No, sir.
Q. When did you go to Fort Smith?
A. May 5, 1917.
Q. You have been there constantly since that time?
A. Yes, sir.
Q. In what capacity, who are you with?
A. Fort Smith Spelter Company, Vice President.
Q. Are you the Manager at Fort Smith?
A. Yes, sir.
Q. Do you — approximately the amount of the investment there?
A. Yes, sir.
Q. What is it?
A. $296,000.00 the cost of the plant.

Q. What do you know about the depreciation of the plant, Mr. Buck?

[fol. 143] A. I know that a smelter is supposed to have to be practically rebuilt as to furnaces in three or four years, and we know it to be a fact. In our smelter we are now repairing the furnaces and completed already two furnaces. The heat is so excessive that it just burns it and warps it out of shape, so the — fall in and interfere with your recoveries.

Q. You have to almost build it new every three or four years?

A. Yes sir, we are doing it now.

Q. Considering that a fact and the uncertainty of the price that you get for your product, state whether or not a smelter company could afford to pay more than four cents for gas.

A. I don't see how they could, sir. I figure each week—I figure the cost of the spelter the ore that week will produce, and I know that figuring it higher than four cents we could not compete, not profitably.

Q. You were not present when the contract was made?

A. No sir, but I am well acquainted with the contract.

Q. I believe that the statement introduced here was presented to you at Ft. Smith and you knew nothing about it?

A. Which statement?

Q. The statement purporting to show the condition of the Ft. Smith Spelter Company?

A. I never saw the statement. I think it is well to explain the reason I would not know about it. The main office previous to moving to Green Castle was at Warren, Ohio, and all the financial end of the business was done at Warren until it was changed to Green Castle, Indiana. The main office has never been at Ft. Smith. We merely do the manufacturing and keep manufacturing records. We have nothing to do with the selling and the profit they enjoy.

Q. You attend to the manufacturing end of it?

A. Yes sir.

Judge Hill: How much have you spent in rebuilding the plant?

[fol. 144] A. I haven't the records, but I would say that building the furnaces over would cost us $8,000 a block.

Q. I asked you how much you had spent so far?

A. I haven't the records; I cannot tell.

Q. Have you spent anything rebuilding your furnaces?

A. Absolutely we have.

Q. How much?

A. It will cost about $8,000.00.

Q. How much have you spent up to the present time?

A. $8,000, I suppose, on that block. We have one block finished. The rock roasters require continual rebuilding, and replacing of fire brick and arches. I can't tell you what it cost, but many thousand dollars.

Q. That goes into operating expenses?

A. No sir.

Q. What?

A. Maintenance of the plant.

Q. That carried as capital, all operating expenses?

A. I suppose, probably—I don't know how it is carried. We made a report and send it to them. I don't know how they keep it. I don't know how they keep it.

Q. How many blocks have you?

A. 4 blocks.

Q. After four years you have rebuilt one?

A. Yes sir, we should have rebuilt it before.

Q. But you haven't?

A. No.

Q. Is there any scale determining the difference in gas delivered at different ounces? Your gas is being delivered at 10 lbs. pressure?

A. Yes sir.

Q. Suppose it is delivered at 8 ounces pressure, what difference [fol. 145] does that make?

A. We could not operate the plant.

Q. Why?

A. We would not have enough gas.

Q. You could not operate the smelter on 8 ounces pressure?

A. No sir.

Q. What is the least you can run on?

A. 5 lbs.

Q. Can't you run on one or two pounds?

A. We could run part of the plant.

Q. You cannot run on less than 5 lbs.

A. Not now. We have changed the orifices out there recently, and that makes a big difference in operating. We have run on less than that, but now it takes five pounds.

(Witness excused.) (Tr., 304-307.)

[fol. 146] W. F. Blocker, witness for petitioner, after being duly sworn, testified as follows:

Judge Hill: You are City Clerk of the City of Fort Smith?

A. Yes sir.

Q. Have you possession of the ordinances granted by the City of Fort Smith?

A. Yes sir.

Q. Have you in your possession an ordinance of the City of Fort Smith granting a franchise to the Clear Creek Oil & Gas Company?

A. Yes sir.

Judge Hill: I want to have Mr. Blocker produce the original here for inspection. We will not file the original but will substitute a copy of it.

(Said ordinance introduced as Exhibit 1 Blocker and permission granted to substitute a copy.)

Q. What was the date of it?

A. It was passed and signed April 3 and published April 5, 1916.

Mr. Daily: I want to state to the Commission for their information right now before I forget it that under the Act permitting commission forms of Government in cities of the first class, this ordinance was effective until thirty days after April 5th.

Judge Hill: That is the ordinance, that is the franchise the Clear Creek Oil & Gas Company surrendered recently?
A. Yes sir.

(Witness excused.) (Tr., 34.)

[fol. 147] F. H. Fennesey, witness for petitioner, after being duly sworn, testified as follows:

Judge Hill: State your name?
A. F. H. Fennessey.
Q. What position do you occupy in Van Buren?
A. City Clerk.
Q. You are the custodian of the records there?
A. Yes sir.
Q. You have the franchise granted by the City of Van Buren to the Clear Creek Oil & Gas Company?
A. Yes sir.
Q. Have you the original?
A. Yes sir.
Q. Have you a copy?
A. Yes sir.
Q. I wish you would exhibit the original and withdraw that, if the Commission will permit you, and file a copy in lieu thereof.

(Original franchise exhibited; copy marked "Exhibit 1 (Fennessey) and filed.)

Q. Have you looked at it?
A. I did not compare it, no sir.
Q. Is the acceptance of the franchise there?
A. Yes sir.
Q. Are you including that in your copy?
A. No sir; I have it here.
Q. File that also in the same way.

(Document filed as part of the foregoing exhibit.)

Q. Have you the record evidence of the passage of the ordinance and the acceptance?
A. Yes sir.
Q. I wish you would file that.

[fol. 148] (Copy of document filed as part of the foregoing exhibit.)

Q. The Clear Creek Oil & Gas Company has surrendered its franchise?

A. It has.

Q. Is this franchise the only one it had; that is, the one it surrendered?

A. It is.

Mr. Daily: I don't know whether you recall what happened when this franchise was up. You heard my question to Mr. McGehee, do you recall whether that happened or not?

A. It has been so long ago that I do not recall it right now, but there was some conversation to that effect, I don't remember what it was.

Q. A conversation to the effect that they were planning to go direct to the smelter east of Van Buren and then across the river?

A. Yes sir.

Judge Hill: That was a sort of a horse trading proposition to get the kind of a franchise they wanted?

A. I don't know, I think it was.

(Witness excused.) Tr., 61-62.

[fol. 149] R. S. Robertson, witness for petitioner, after being duly sworn, testified as follows:

Judge Hill: State your name?

A. R. S. Robertson.

Q. State your relation to the Clear Creek Oil & Gas Co.

A. Secretary-Treasurer.

Q. How long have you occupied that honorable position.

A. Ever since the Company was organized.

Q. What are your emoluments in that position?

A. Nothing right now. I don't do much work connected with it, but during a year and a half, during the organization, I expect I had more to do with it than anybody else.

Q. You were practically in charge of its affairs?

A. Yes sir.

Q. And Mr. McGhee moved here and took charge?

A. Yes sir, in January 1919 he came here and took charge; up to that time I had charge.

Q. You are only a small stockholder?

A. Yes sir.

Q. You have not charged the company anything for your services?

A. Not a dollar.

Q. Did you negotiate the contract between Mr. Kerr and Mr. Buck under which the Ft. Smith Smelter Co. was erected?

A. Mr. Speer and myself and Mr. McGehee.

Q. I wish you would state who Mr. Speer is and his connection with the company.

A. Mr. Speer was General Manager of the Speer Hardware Co. Mr. Speer and Mr. McGhee, Dr. Cooper and myself were the Ft. Smith directors of the Company.

Q. When did Mr. Speer Die?

A. In 1918, I think it was, no, August 25, 1917.

[fol. 150] Q. Mr. McGhee was active in the management of the Company up to the time of his death?

A. Yes sir.

Q. After his death you continued in charge until Mr. McGhee came over?

A. Yes sir.

Q. I will ask you whether your plans had been worked out to build a pipe line at the time you entered into this contract with Kerr & Buck.

Judge Mehaffy: We object.

(Objection overruled; exceptions saved.)

A. Yes sir. As soon as we brought in that first well. The gas would not be of any value over there in the field, and we had to build a pipe line.

Q. And you were also looking for consumers of gas?

A. We commenced figuring in January and finding out about pipe, and our order was placed during the early part of March, for the pipe.

Q. That is for the 10 inch pipe line you afterwards laid?

A. Yes sir.

Q. And this contract shows that it was made on March 17th. You had ordered your pipe line before you made that contract?

A. Yes sir.

Q. Do you know whether Mr. Kerr and Mr. Buck were informed of that fact?

A. Yes, they knew it. They would not have built the plant unless they had known that we were going to build a pipe line.

Q. Knew it was a ten inch pipe line?

A. Yes sir, that had all been gone over.

Q. It seems that there was some memorandum agreement entered into between your Company and Mr. Hothorn before the formal agreement was made. Was this pipe line ordered before you had this preliminary agreement with Mr. Hothorn?

A. Yes sir.

[fol. 151] Q. Was he informed of that?

A. Yes sir.

Q. In fact, he helped to finance it, did he not; and he knew that pipe line was to run to South Ft. Smith?

A. Yes sir.

Q. We have had a search made of the records of the County Court and have failed to find any record of any order having been entered there authorizing the Clear Creek Oil & Gas Company to use the highways of Sebastian County for the laying of their pipe line. I will ask you if you took that matter up with the County Judge?

A. Yes sir, we did, Mr. Speer and myself took it up with Mr. Hester and he gave us permission. I don't know why no record was made by him of the matter.

Q. He was County Judge?

A. Yes sir.
Q. You got his permission before you began laying the pipe line?
A. Yes sir.
Q. You heard Mr. McGhee's testimony about the development of the field and the financial situation of the Company and its condition from time to time. I will not go over these details with you again, but I will ask you if he has made a correct statement of these matters so far as your knowledge goes?
A. Yes sir.
Q. You have knowledge of — practically testified to upon this subject, have you not.
A. Yes sir.
Q. Do you know anything about the financial condition of these two smelters—the Arkansas Zinc & Smelting Corporation and the Ft. Smith Smelter Company?
A. I have been a director until recently in the Arkansas Zinc & Smelting Corporation from the time of its incorporation up to the present time; and a stock holder at the present time; I have $10,000 of their stock. I resigned recently on account of a difference there [fol. 152] was between the Gas Company and the Smelter over this gas proposition. At the last annual meeting I tendered my resignation and it was accepted.
Q. I hold in my hand here two papers that purport to be balance sheets of the Arkansas Zinc & Smelting Corporation, one dated March 31, 1917 and the other dated September 30, 1919. I will ask you if you are familiar with these?
A. They were sent to me by the Company from New York.
Q. As a statement of the affairs of the Company?
A. Yes sir.
Q. I wish you would identify these and file them.

Mr. Daily: We want to object to them for the purpose of the record, because we do not think that has anything to do with the price of gas to be furnished. In other words, if they are a public service corporation they are probably entitled to a reasonable compensation, and they are entitled to it whether we are making or losing money, and we can take it or not, as we see fit.
Judge Hill: One of the allegations in our petition is that these companies have made excessive profits owing to the low price of gas which they have been paying, and I think that is a matter for the Commission to consider. That is my purpose.

(Objection overruled; exceptions saved.)

Judge Hill: Does that statement show in any way the profit that has been made?
A. As I would analyse it I would say yes.
Q. In what way?
A. On March 31, 1917 they had plant and buildings $305,807.13 and on the statement they made September 30, 1919 they have charged that plant off down to $150,575.61. In other words, there is $150,000 made between these dates.
Q. Do you know what their investment represented?

A. $200,000 preferred stock and there is $400,000 common stock out.

Q. That bonus stock?

[fol. 153] A. Yes sir.

Q. That was velvet. There was an actual investment of $200,000 in cold cash?

A. Their capital was $200,000 to start with.

Q. Do you know whether that is a correct statement or not of the Ft. Smith Spelter Company?

A. I saw that copied from one of the other statements; it is a correct copy of one of the other statements.

Judge Mehaffy: We object to that for two reasons: it is immaterial and incompetent testimony, and anyhow, they can get a correct statement if they want it; they could have gotten it long ago.

(Objection overruled; exceptions saved.)

Witness: This shows profit and loss $210,849.04 up to December 31, 1918.

Judge Hill: When did they begin operating?

A. June or July in 1916.

Q. And from June or July 1916 to December 31, 1918 it shows a profit of how much—that was for a year and a half?

Judge Mehaffy: We object.

(Objection overruled; exception saved.)

(Financial Statement Fort Smith Spelter Company, Dec. 31, 1918" marked "Exhibit 2 (Robertson)" and filed.)

Mr. Daily: Do I understand that you figure a profit of $150,000 because they charged that much off to depreciation? That was your statement?

A. I stated that on that statement it showed that.

Q. You said that was a profit because they depreciated their plant $150,000. Do you consider that you have a profit because of the fact that you depreciate your pipe line 15 per cent a year? When you figure with the smelter, it is a profit; when you figure with the Gas Company, it is a loss?

A. No sir; this was the way he figured it, Mr. Hothorn's way of figuring it in the letter he wrote me.

[fol. 154] Q. As a matter of fact, is there not depreciation in a smelting plant?

A. Yes, indeed, a certain amount.

Q. And their plant depends absolutely on the supply of gas?

A. They tell me not, that they could buy coal and create their own gas and it would be cheaper than natural gas.

Q. Then you put it purely on the proposition that they could use coal?

A. That is the statement that Mr. Hothorn made to me.

Q. If they cannot do that, then their plant is practically a total loss at the time the gas expires.

A. I do not know what the salvage value would be.

Q. As a matter of fact, you don't know anything about it?

A. No, I haven't been in the smelter business yet.

Judge Hill: Mr. Daily questions the fact that the conclusion you draw from that is a correct conclusion. Have you any authority for drawing that conclusion?

A. Mr. Hothorn wrote me and told me this. He wrote this letter to me on May 1, 1916 and it is signed by him.

Mr. Daily: Just before you signed the contract?

A. Yes sir; in it he said they expected to make 100 per cent a year. I will read his letter; here is his own letter.

Mr. Daily: I want to know what you expected to make in the Gas Company before you read that letter?

A. We expected to make a damned sight more than we have made.

(Letter dated New York, May 1st, 1916, signed by E. G. Hothorn and addressed to Mr. R. S. Robertson introduced, marked "Exhibit 3 (Robertson)" and filed.)

Witness reads above mentioned letter.

Judge Mehaffy: We object to that.

(Objection overruled; exception saved.)

Judge Hill: His statement there: "You know, there will be no actual"—"actual" is underscored—"profits until all our investment [fol. 155] plus interest has been repaid;"—plus interest is added there, and you take it from that statement that that was his method of doing it, wiping out that $150,000?

A. That was the way it looked to me.

Mr. Daily: That letter was written May 1, 1916?

A. Yes sir.

Q. At that time you had not furnished a foot of gas to the Arkansas Zinc & Smelting Corporation? Your pipe line was not built and your plant not completed?

A. I don't think we delivered any until January.

Q. He wrote you that they had made $125,000 prior to your delivering a foot of gas on the purchase of ore?

A. He wrote that he had bought ore, which, when smelted, ought to show a profit that would be made out of gas he was going to get.

Q. And they were a New York corporation?

A. I think so.

Q. They had a plant in process of construction at that time?

A. Yes sir.

Q. Are you still a stockholder?

A. Yes sir.

Q. And receive a 7 per cent dividend on your preferred stock every year?

A. Yes sir.

Q. All you have got?

—. ———

Q. You made a statement about watered stock, or Judge Hill did. As a matter of fact, there are 4,000 shares of stock of the Arkansas Zinc & Smelting Corporation that have no par value at all and do not purport to be $400,000?

A. $200,000 of preferred stock, two for 1. If that has any value [fol. 156] it is $400,000.

Judge Mehaffy: You say you saw that copied from a statement that purports to be a copy of a statement, when did you see that done?

A. That was possibly before the other trial in the United States Court, I think; along in January or February.

Q. Will you just tell how you came to see it?

A. I asked for it.

Q. From whom?

A. The people I got it from.

Q. That does not answer the question. From whom did you get it.

A. I don't care to answer that question.

Judge Mehaffy: If the Commission please, I think that ought to be answered.

Chmn. Wilson: Mr. Robertson testified that he saw it made and that he is willing to swear to it.

Judge Mehaffy: I think it makes a good deal of difference. Haven't I got a right to know who it was so that we can at least interrogate him and if we desire put him on the stand? He should not be allowed to go ahead and put it in and not tell the name of the party who gave it to him.

Witness: I will tell you. I had seen the statement a good many times. I saw it in the First National Bank. They had it and I asked them to let me see it and I had a copy made of it.

Q. How did they get it?

A. I guess they sent it to them.

Q. That is just a guess?

A. They either sent it or gave it to them.

Q. You don't know that?

A. No, I was not there when they gave it to them.

Q. You had this statement copied from a statement that some- [fol. 157] body told you was a statement of the Smelter Company. Is that not true?

A. I took it to be the statement; they said it was.

Q. I am not asking what you took it to be. I am trying to put it the way you said it was. You got it from a person that told you it was a statement?

A. And that was the Bank.

Q. What particular man in the Bank?

A. Mr. Secord.

Q. Do you know how they claim to have come by it?

A. No, I do not. I suppose it was given to them by the Ft. Smith Spelter Company.

Q. You never heard anybody that had anything to do with the books of the Ft. Smith Spelter Company say that was correct, did you?

A. No sir.

Q. And you got that after one of these trials?

A. Before the other trial.

Q. You mean the last trial?

A. The one we had in the United States Court here.

Mr. Daily: You are familiar with the fact that there has been considerable stock in the Arkansas Zinc & Smelting Corporation sold in Ft. Smith in the last few months?

A. There has been some, not any considerable amount.

Q. Such of it as has been sold and that is the preferred stock, has been sold at from 90 to 105. Is that not a fact?

A. I know some sold at 100 and some at 125. I do not know of any that sold at 90.

Q. Is your stock on the market?

A. There have been several people trying to buy it; your brother has. Your brother offered me 105.

Q. Are you offering it for sale?

A. I told him I would take 110.

Q. I will ask you if a day or two before this hearing there was not an offer made to your company to buy any part of the Clear [fol. 158] Creek Oil & Gas Company's stock at 4 for 1?

A. That may be; our stock sold 5 for 1 a few days after our first well was brought in and before we built that pipe line.

Q. Your original stock went in at par?

A. Yes sir.

Q. I will ask you if you have not had an offer made you, with your present contracts and everything, of more money than your total capital?

A. Yes, the smelters are offering it.

Q. The Arkansas Zinc & Smelting Corporation has made you that offer and you have refused to sell at less than $700.00 a share, that is the price you put on your stock?

A. Yes sir.

Chmn. Wilson: What is the par value?

A. It sold for $500 a share since we brought in the first well.

Q. $15,000 of it represented leases?

A. Yes sir, $15,000 represented leases, but those leases cost the bunch that went into it, Mr. Speer and the rest of us 72 or $7,400.00, and we were offered $20,000 for them before we turned them into the company at $15,000, but the people would not agree to do any drilling.

Q. Figured at $120,000, that would make an actual cash investment in this company of $110,000?

A. We only actually invested $105,000.

Q. Your price you want for it on a $45,000 capitalization, that is your capital stock, is $315,000?

A. Yes sir.

Q. You made the statement to the man who made that offer that you could earn a reasonable return on that valuation, didn't you?

A. I didn't do any such thing.

Q. Didn't you say the stock was worth that?

A. I said that we hoped it would be worth that.

Q. If you got a 10 cent rate, it would be worth it?

A. It might be.

[fol. 159] Judge Hill: You are holding this stock with the expectation that you will get an increased rate? At a 4 cent rate, what is it worth?

A. I do not know. It is pretty hard to tell whether it is worth anything or not. The company has never paid a dividend and has never gotten any interest. The basis they are trying to buy on is simply the interest for the four years we have been operating.

Q. That is the proposition of the Arkansas Zinc & Smelting Corporation?

A. Yes sir; the original stockholders have never gotten anything for the discovery of that field.

Q. They went into it as a sporting proposition and are standing by it?

A. Yes sir, it is worth something or nothing. We gambled on it and spent 3 or $400,000 for a pipe line, and we figured that our physical assets are worth something.

Q. If you accepted the proposition of the Arkansas Zinc & Smelting Corporation, how much loss would it be to the stockholders?

A. I would have to figure that out. It would be quite a loss. Some of it sold at 6 and 7 for 1.

Q. Figure on one share costing him $500 and they offer him $400 now, about 4 years afterwards?

A. They would lose $100 besides the interest.

Mr. Daily: The original investment, the actual investment of the stockholders in stock is $105,000?

A. That is a fact, but there was $15,000 of that stock that sold 5 for 1—$75,000. If it had all been sold on the same basis and every man could have sold his stock for 5 for 1 it would have been $225,000.

Q. Your actual investment was $105,000?

A. Yes sir.

Q. You have now been offered $180,000, on the basis of 4 for 1, haven't you?

A. Yes sir. That would mean a loss of $100 a share for every [fol. 160] man who bought stock and paid 5 for 1 for it. He is entitled to that if he can bet 4 for 1 in a gambling proposition.

Q. Is that based on the 10 cent rate you are asking?

A. No, we are trying to get a reasonable return on the cost of producing gas at the present time.

Q. Outside of the $105,000 which you have really invested, the money you have spent is money you have got from these smelters, practically?

A. Some of it. We owe $79,000 now; we have owed more.

Judge Hill: I have a calculation here showing that those stockholders that paid $500 a share would be out, counting 8 per cent interest to date, $660.

A. We figured it at about that.

Q. And you are asking $700?

A. Yes sir.

Q. And the smelters want to give you $400?

A. Yes sir, I have heard they stated they would put us in bankruptcy and buy it for any kind of a price. That has come to me as hearsay.

Comr. Brasher: Was your stock ready — sale at 5 for 1 when you made this discovery?

A. Yes sir; we only offered $15,000 worth of it and it was taken right now, and in a few days it sold for 6 and $700 a share.

Mr. Daily: As a matter of fact, you sold that stock at 5 for 1 long after you made the contracts with both of these smelters, didn't you?

A. I don't remember. I would have to look up the records.

Q. Is it not a fact that you sold it long after your pipe line had been completed and you had started delivering gas?

A. That is possibly true.

Q. So it is not a fact that it was sold at the time of the discovery?

A. I can bring you in quite a number of people who will swear that they were offered $600 and $700 a week after the well was brought in.

[fol. 161] Q. As a matter of fact, here was the financing of the company; Leases were put in at $15,000 and stock issued against it, and then $15,000 in money and stock at par was issued to these stockholders?

A. Yes sir.

Q. Then you went ahead and built your pipe line on borrowed money and the $45,000 subsequently advanced by the Arkansas Zinc & Smelting Corporation?

A. Borrowed money and what we sold stock for.

Q. You built your pipe line before you sold your stock?

A. Yes and paid it back.

Q. About the time you put your bond issue on the property you sold this stock for 5 for 1, this treasury stock?

A. I don't remember just when it was sold. We can get the records.

Judge Hill: I wish you would look up that date.

(Witness excused.) (Tr., 151-165.)

[fol. 162] R. S. Robertson, recalled, testified as follows:

Judge Hill: Regardless of whether you got par or 4 or 5 for 1, all the money you received from the sale of stock has gone into this Clear Creek Oil & Gas Company property over here?

A. Absolutely every cent, and the directors now are individually liable for a good part of this $79,000, money they borrowed.

Judge Mehaffy: Did you get any other statements or copies of statements except this one?

A. No sir.

Q. You did not see a recent one at all from the Ft. Smith Spelter Company.

—. I saw a consolidated statement of the zinc companies too but I could not tell anything about it.

Comr. Brasher: What was the capital stock of your company at the time this well was brought in? It was $30,000, was it, of which $15,000 you sold was part of the $30,000?

A. Get this right: The gentlemen that organized and promoted this thing went to work, as Mr. McGhee told you, and took 20 to 25,000 acres down there under lease. The cost of getting these leases and recording them together with the geological reports was 72 or $7,400. We had three geological reports made of that field, if there were any prospects of getting any gas we intended to ask our friends to go out and sell enough stock to develop it. A few of us had put 72 or $7,400 into it. If the report was good, we were going out and trying to raise money enough to drill a well and see if we could not get a gas well near Ft. Smith. When the reports were made to us and they were favorable, a man came here and offered us $20,000 for the leases we had at that time. In other words, he offered us $1.00 an acre. We told him we would let him have them at that if he would agree to drill two or three wells 3,000 feet deep. He would not agree to drill any wells and we did did not make any trade. The reports being favorable, we turned the leases we had into a company for $15,000 worth of stock. In other [fol. 163] words, the men that worked on this thing for 6 months took a gambler's chance and got 2 for 1 and we went out in town and sold for cash $15,000 worth of stock to drill a test well. That made the $30,000. Later on we increased the capital to $50,000. After we got the well we sold only $15,000 worth of that stock at 5 for 1. We could have sold ten times that, because everybody was wild about it.

Comr. Brasher: That was after the well was in and the capital stock had been increased to $50,000 that you sold the 15,000?

A. Yes sir.

(Witness excused.) Tr., 167-168.

[fol. 164] R. S. ROBERTSON, witness for petitioner, after being duly sworn, testified as follows:

Judge Hill: There was some testimony introduced at the last hearing that Mr. Hothorn had offered the Company $400 a share for stock. I will ask you if the company at any previous time had offered to Mr. Hothorn or the smelters to sell the stock of the Clear Creek Oil & Gas Company, and if so, when and for what amount?

A. At a conference we had in St. Louis with the Ft. Smith Spelter Company and Mr. Hothorn we offered to sell them the company for exactly what we had put into it, $105,000.

Q. Was that offer accepted?

A. It was not, it was refused.

Q. When was that?

A. I think that was in 1918 that we had that conference.

Q. Before you went to Washington?

A. Yes sir.

Q. Do you remember the date you were in Washington?

A. No sir, it was Armistice Day, in November.

Q. November 11th?

A. Yes sir.

Q. This was before that time?

A. Yes sir.

Q. I will ask you if Messrs. Kerr & Buck had counsel when they entered into the contract with the Clear Creek Oil & Gas Company?

A. Yes sir.

Q. Did the Clear Creek Oil & Gas Company have counsel at that time? Who made them on behalf of the Clear Creek Oil & Gas Company?

A. Mr. Speer and myself.

Q. You were new to the gas industry?

A. Yes sir, we had not had any experience then.

Q. Did you ever raise the question or have the question raised as to priorities in your contract, whether they were valid?

A. I did not raise the question. Mr. Parke of the Radiant Glass Company raised the question several times. In fact, when I went [fol. 165] up there and wanted him to move to Fort Smith and submitted them a contract, he said, "Well, you are——

Judge Mehaffy: We object to this testimony, it is hearsay.

Judge Hill: You can leave that out. I will ask you whether or not Mr. Parke raised the question as to whether these things were valid?

A. Yes sir.

Q. Did you at any time have an opinion rendered upon that subject?

Judge Mehaffy: We object to that.

Comr. Wood: Relative to priorities?

Witness: Yes.

Comr. Wood: He can answer the question.

Witness: He brought the question up later and asked me if we had ever had our attorneys give an opinion and I told him we had not.

Judge Mehaffy: We object to that; that is a conversation. He asked him if he had had an opinion and he goes on and details a conversation with the fellow, which is clearly inadmissible.

Judge Hill: I want to show the utmost good faith on the part of the company.

Judge Mehaffy: Assuming that is true, don't he still have to show it by legal and competent testimony? Can he tell what somebody told him?

Comr. Wood: I think he can go to the extent before this Commission of showing by any means he desires what steps he took and what acts were performed.

Judge Mehaffy: We object to hearsay testimony.

(Objection overruled; exceptions saved.)

Witness: He asked me if we had ever had that matter passed on by our attorneys and I told him no. He suggested that we do it. I took the matter up with Judge Hill and told him the question had been raised and asked him for his opinion and he gave us a written opinion.

Judge Hill: I hand you this and ask you if that is a copy of it?

A. Yes sir, that is the letter you wrote us at the time.

[fol. 166] Q. I wish you would hand that to the Commission.

Mr. Daily: I certainly object to Judge Hill's opinion on a question of law. That is all it is, as to whether or not the provisions in the contract relative to priorities are valid. The Commission may be arbitrary in the introduction of evidence with reference to facts, but it occurs to me that the question of law, whether or not a provision in a contract is a valid and legal provision or not, is a question to be passed upon by the Commission. If Judge Hill wants to make an argument and produce the authorities he has in that letter, that is all right; but for him to introduce as a fact the opinion—an ex parte opinion—which he has given to the Clear Creek Oil & Gas Company subsequent to the execution of these contracts, it occurs to me is absolutely out of all bounds of any character of evidence. It is not evidence at all.

Comr. Wood: The Commission will consider it only for the purpose for which it is introduced, to show good faith on the part of the company. The Commission will recognize it is Judge Hill's opinion on a matter of law.

Judge Hill: We will follow that up by showing that he delivered copies to these parties. I wish you would read that:

Witness (reads):

"Fort Smith, Ark., May 27, 1918.

"Replying to your question as to the validity of preferential rights to gas supplied by the Clear Creek Company we have to say:

The Clear Creek Oil & Gas Company is a quasi-public corporation which has held itself out to the public as engaged in supplying natural gas to industries and manufacturing plants. That position carries an implied obligation to serve equally to its capacity such class of consumers. It cannot so contract that it may disable itself from serving without discrimination the class of consumers which

it professes to serve, because such stipulation would be contrary to public policy and void. It may be that the Clear Creek Company on account of such contracts and their inducement to the industries to [fol. 167] invest money in reliance on them would be estopped to avoid this preferential part of the contract. We are not now considering that question.

We can see no valid reason why an industry seeking its gas—one not trammeled by a contract subject to the preferential contracts could not in an appropriate suit against the Clear Creek and a company holding the contractual preferential right have such preferential right declared void. In the event of such judgment it is our opinion that this adjudication would bar the right of action for damages on that contract for a refusal of the Clear Creek Company to give the preferential right provided in the contract.

We refer to the following authorities which we have consulted, and which have led us to the above stated conclusion, to-wit:

9 Cyc. 481-483, 498-499.
Wiggins Ferry Co. v. Chicago & A. R. R., 128 Mo. 224.
Sammons v. Kearney, P. & I. Co., 110 N. W. 368.
Chicago Gas Light Co. v. Peoples Gas L. Co., 2 Amer. State Rep. 124.
Pueblo & Ark. River Ry. v. Taylor, 6 Colo. 1.
Archer on Oil and Gas, pp. 984, 994-6.
Thornton on Oil & Gas, Secs. 531-539.
1 Wyman on Public Service Corporations, Secs. 688 and cases cited in notes.
1 Page on Contracts, Sec. 326 and cases cited in notes.

We would be glad for any interested parties to have their counsel examine the authorities above cited and advise their clients, if in their opinion we have reached a sound conclusion from them. We think we have, and want interested counsel to thoroughly investigate those authorities and others referred to in the cases and text books cited."

Judge Hill: I furnished copies of that letter to each of the three smelters?

A. Yes sir, to all of them.

Q. At about the time that letter was dated?

A. It was later; I don't remember the time. We had some correspondence with the Ft. Smith Spelter Company and Mr. Buck came down and I read it to him; he asked for a copy and I gave it to him, gave Mr. Hothorn a copy and gave Mr. Orr a copy. Mr. Hothorn was quite anxious to get it because he thought it put him in a better position than he was.

[fol. 168] Q. Has your company ever sought at any time to avoid these priorities?

A. No sir.

Q. Did you insist on these priorities and cut off customers that were paying you better prices for gas when your gas supply became low?

A. Yes sir.

Q. Didn't you cut off, or attempt to cut off the glass factories when they were offering you 10 cents for gas?

A. Yes sir.

Q. In the litigation over it, did you seek in any way to avoid these priorities?

A. No sir.

Mr. Daily: The contracts with the Ft. Smith Spelter Company and the Arkansas Zinc & Smelting Corporation were entered into in the spring of 1916?

A. Yes sir.

Q. This letter of Judge Hill's was not written until May 27, 1918?

A. No sir.

Q. At that time there had been a diminution of the gas supply to an extent that it looked like there might not be enough gas to go around?

A. Yes sir.

Q. At that time the glass companies were trying to insist that the priorities in their contracts were not enforceable?

A. As I started to say, Mr. Parke insisted that when he signed the contract, that he did not think the contract amounted to anything.

Q. Notwithstanding that fact, he did sign a written contract which recognized the priorities?

A. Yes sir.

Q. It was contained in the written contract, that his right to take gas would be subject to the rights of the smelters; there was a long [fol. 169] paragraph to that effect?

A. Yes sir.

Q. In 1918 when the shoe began to pinch he began to insist that the priorities did not obtain?

A. Yes sir.

Q. You got this letter from Judge Hill at that time?

A. About that time.

Q. Afterwards the Radiant Glass Company brought a suit insisting that the priorities did not obtain?

A. Yes sir, they got out an injunction.

Q. And your company, Judge Hill representing you as counsel, took the position that the priorities did obtain?

A. I think he did. I don't think he took exactly that position, but took the stand that we were trying to live up to these contracts, whether they were legal or not.

Q. You took the stand that you had made a contract and that the Radiant Glass Company had made a contract and they provided for priorities and you were going to insist on carrying them out?

A. When you ask me about the position taken by counsel, that would be hard to say.

Q. Was that not the position taken by your company?

A. We were not avoiding these contracts.

Q. You were insisting that these priorities were valid?

A. We did not get to that point.

Q. Was that not the effect of your pleadings?
A. I did not read the pleadings, never saw them.
Q. You did not insist that they were not valid?
A. Not that I know of.
Q. And you did cut off the Glass Company or attempt to do so?
A. We notified them we were going to cut them off.
Q. Pursuant to the terms of these contracts?
A. Yes sir.
Q. Notwithstanding this letter of Judge Hill's?
A. I don't know whether that was before or afterwards.
[fol. 170] Q. You say that when you entered into these contracts you and Mr. Speer made them, there was no attorney advised you. You had attorneys, didn't you?
A. Your firm was our attorney.
Q. In what capacity did I represent you?
A. The Reynolds-Davis Grocery Company. The Clear Creek Oil & Gas Company had no attorney. The only attorney we had had was when the incorporation papers were drawn up by Mr. Martin, several years before.
Q. There were lots of them available?
A. I guess there were. I don't think they were all dead yet.
Q. You say that at St. Louis in November, 1918—that was a few months after this letter of May 27, 1918—you offered to sell the Company?
A. I don't remember whether it was before or afterwards. We had two conferences with them.
Q. As a matter of fact, it was before November, 1918?
A. Yes, before November, 1918.
Q. And at that time you offered to sell the property of the Clear Creek Oil & Gas Company for $105,000?
A. Yes sir.
Q. Since this petition was filed you have had an offer of $250,000, haven't you?
A. Yes sir; we were to pay all the debts, and that other was net to us.
Q. The last one was a better offer?
A. Yes sir.
Q. In other words, in 1920 you have had a better offer than in 1918?
A. You know how much we have spent since then in pipe lines, etc.
Q. That offer you declined?
A. Yes sir.
Q. As a matter of fact, there has been no more stock sold since [fol. 171] that time?
A. No sir. The last stock that was sold it all sold 5 for 1.
Q. That had been sold for 5 for 1 prior to that meeting in 1918 when you offered to sell for $105,000?
A. That is a fact.
Q. The best offer you made in 1920 was to sell the stock for $700 a share?

A. I cannot say that.

Q. Is that not the best offer you have made?

A. No, I think Mr. McGehee possibly had some conference at which he said he would take a little bit less.

Q. How much less?

A. I am not going to answer that question.

Q. That is a question you refuse to answer, is that a fact?

A. Yes sir.

Q. You are not willing to tell this Commission what value per share you place on the stock at the present time?

A. I was not at that conference and I do not know what offer he made.

Comr. Wood: Have you made any direct offer yourself?

A. I have not.

Mr. Daily: You have made an offer yourself?

A. I said that I would not be willing to sell the property for less than $700 a share, and I will tell you my reasons for doing that if you want to know.

Q. That is the best you have been willing to do?

A. Yes sir.

Q. This property is worth a good deal more now than it was before November, 1918?

A. I should say so. We have spent a great deal of money on pipe lines, and physical assets.

Q. The business is worth more, gas conditions have changed for the better?

[fol. 172] A. It is a question whether they have changed for the better or not. We have about the same amount of gas, I think, now, maybe a little more than we had then.

Q. At any rate, from your standpoint it has changed for the better, because you want more money now than you did then?

A. Yes, as far as we are concerned, we feel that it is a good deal better now.

Q. You say you have spent considerably more money. That money you have spent has been largely obtained from operating the plant, has it not?

A. Some of it, yes sir. A good deal has been borrowed by the directors to make improvements down there.

Q. You don't owe as much money now as you did in 1918, at the time you offered to sell for $105,000?

A. I don't remember now what we owed at that time.

Q. You have paid off a lot of bonded indebtedness?

A. Some of it.

Q. And a lot of the floating indebtedness?

A. No, the floating indebtedness is possibly as much now as it was then.

Q. You paid off what you owed then and incurred some since? The bonded indebtedness has been largely reduced?

A. I don't know what it was in 1918.

Q. You know it is not any more?

A. I know it is not any more.

Q. So the net result is that although you borrowed money, the money that you put into the plant has come from operations?

A. Largely.

Q. It has come practically from the money these three smelters have paid you?

A. Yes sir.

Judge Mehaffy: What was the object in getting this letter from Judge Hill?

[fol. 173] A. We wanted to know, the directors did, whether there was anything in the question that had been raised. One of our people we were selling to, Mr. Parke, had raised the question, and we wanted to know whether we were a public service corporation or not.

Q. That was the only purpose?

A. So far as I know it was.

Q. If that was the only purpose, how came you to wait two years after this convention had been made before you got this letter and sent it out to interested parties?

A. The gas situation had not gotten serious and the question had not come up to where we would have to cut anybody off.

Q. But you said that two years prior to this time, before you asked for this letter, the same question had been raised and the statement made that they were invalid and you did not seek to get any letter from Judge Hill until you got this one on the validity of these contracts?

A. That is not what I stated. I stated that when Mr. Parke signed that contract he said, "I am signing this contract, but so far as these preferential clauses are concerned, from experience I have had with water companies, I don't think it is worth a cent; eventually I will stand in the same position as anybody else."

Q. What is the difference between that question and the one I asked?

Judge Mehaffy: He did inform you——

Comr. Wood: Let him answer the question.

A. He did not ask whether we had had it passed on by our attorneys. We did not think anything about it.

Comr. Wood: He did not ask you this last time whether you had had it passed on?

A. Yes, I said so. He asked if we had ever gotten an opinion and we told him that we had not but that I would get one.

[fol. 174] Judge Mehaffy: Is it not true that the very question that was involved, either you did not ask Judge Hill to pass on, or he did not pass on it?

A. You will have to ask that some other way.

Q. All right, I will ask it some other way.

A. I did not get you.

Q. I think you will, if you will listen. Here is a statement in the letter?

"It may be that the Clear Creek Company on account of such contracts"—these preferential contracts—"and their inducement to the industries to invest money in reliance on them would be estopped to avoid this preferential part of the contract." That question as to whether you could avoid the contracts you are now seeking to avoid was a question he did not answer at all, but said you might not be able to do that?

A. I don't get you the way you have gone at it.

Q. These contracts that gave preferences to the smelters, as to whether they are valid or not, you did not inquire about that, or if you did, Judge Hill didn't answer, did he?

A. We asked him for the information that he gave us in that opinion, as to whether we were a public service corporation or not.

Q. But you did not ask him whether these contracts made by you bound you or not?

A. I don't think so.

Q. That was really the question at issue, was it not,—whether they were binding contracts?

A. I guess it was because the preferred rights they were trying to knock out, so all could get gas on the same basis.

Q. Was the question of whether these contracts were valid considered?

A. I don't think we asked him that; we simply asked him whether we were a public service corporation.

Q. You say you never sought to annul or avoid these priorities. That is what you are seeking now, isn't is?

[fol. 175] A. Not as I understand it. I am not enough of a lawyer to understand that. I don't think we have any objections to the contracts standing as they are now. I think that all we want is for the people we are selling gas to to pay us a fair price. If the Commission says that — have authority to void these contracts, we haven't anything to do with it.

Q. You are asking them now to void the contract?

A. I have not read the——

Q. Aren't you asking them to pay you 10 cents for gas, to authorize you to collect 10 cents?

A. Yes sir.

Q. Don't you know that is a direct request to avoid the contract?

A. No, I do not understand it that way. We are asking them to fix a fair rate at which we shall sell gas to the smelters, because we have been selling it to them ever since we have been in business at a loss.

Q. But that was your contract?

A. The contract was 4 cents.

Q. What you are asking them to do is to abrogate the contract so far as the price is concerned?

A. You know when that contract was made, two years before the war, and conditions have changed. If conditions were like they were then and pipe not three times as high, it might be different.

Q. You are asking now, of course, that the price in the contract be annulled. It could not be anything else but that.

A. I understand they were not to be annulled, but that they were to fix a fair price.

Q. Would not that—if they fix a fair price, you expect to get that, don't you?

A. Yes sir.

Q. If you did, would not that annul the contract?

A. It would annul the 4 cent price.

Q. Or any other price? You claim you afterwards made an 8 [fol. 176] cent price?

A. Yes, sir.

Q. If you get it fixed here, it would annul any price?

A. We would expect to get the price they fix.

Q. You say you are not much of a lawyer. Aren't you lawyer enough to know that if they do what you request them to do here, that is, if they have any authority at all, that they would not only fix the price, but that the very authority that authorized them to do anything at all would authorize you to furnish gas to everybody, to the public indiscriminately?

A. I don't know what their powers are.

Judge Hill: At the time you offered to sell the plant for $105,000 in St. Louis at that conference, didn't you discuss that letter with Mr. Ballard and Mr. —— ?

A. This question came up then.

Q. At that time there was no Corporation Commission in Arkansas?

A. Not that I know of.

Q. At the time you refused their offer of $400 a share this matter was pending here, this proposed increase to 10 cents?

A. Yes, sir.

Q. And they made you no proposition until after you brought this proceeding?

A. No, sir.

Q. At the time they turned you down in 1918 until two days before you went into this hearing they never made you any proposition at all?

A. No, sir.

Q. Has not that proposition been withdrawn too?

A. I think it has. That is my understanding.

Judge Mehaffy: At the time Judge Hill asked you about, when you met these parties in St. Louis, you say you showed them that letter?

A. No, I did not state that. I said we discussed that letter.

Q. Didn't you go immediately from that conference to Wash- [fol. 177] ington, before the War Board, and seek to get them to increase the price for you?

A. At that time the gas companies were all under the Fuel Administration. I don't know that I went immediately from there but we went on soon afterwards, and at that hearing they found the price of gas, cost of gas was approximately 8 cents in the Ft. Smith

field and said that they would recommend to the smelters that they pay us that.

Q. I did not ask you any of that at all. I asked you if you did not go immediately from this conference at St. Louis and make application to the War Board for an increased rate?

A. We went soon afterwards.

Q. Did you go back home and then go?

A. That is my recollection. Went home, possibly two or three weeks afterwards. They sent out notices of this hearing.

Q. Was the offer made ever open at all after that conference, or for immediate acceptance?

A. I don't remember. We told them that we would recommend to our Board that they take it and felt certain they would. They said they would not give it.

Q. Don't you remember whether it was for immediate acceptance or not?

A. No, sir, I could not say.

Q. Then you did go on and make application to the War Board?

A. We did later.

Q. Your application was for an increased price?

A. I don't know whether we made application or not. It was a hearing called by them on account of the fuel situation. I don't know who made the application.

Q. You say you don't know who made the application. Didn't you file a petition and insist——

A. We may have.

Q. On a higher price for gas?

A. We were asking for a higher price so we could go ahead and develop.

[fol. 178] Q. You don't know whether you filed a petition or not?

A. I do not.

Mr. Daily: While I was gone I understood you testified that Mr. Hothorn had withdrawn his offer?

A. So far as I know; that was my understanding.

Q. Have you got the letter?

A. No, but I got my information from Mr. McGehee.

Q. You haven't got that letter?

A. No, sir, I haven't had any dealings with Mr. Hothorn at all, and haven't had any conference with him.

Q. Don't you know that if it was withdrawn it was withdrawn by letter?

A. No, sir, I do not.

Q. You don't know that a letter was addressed to the Clear Creek Oil & Gas Company?

A. No, sir.

Q. You don't know the date of it?

A. No, sir.

Q. You don't know how long the offer remained open?

A. No, sir.

Q. Your whole information is hearsay, what McGehee told you?

A. Yes, sir.

Q. And he is here?

A. Yes, sir.

Judge Hill: Was not that hearing in Washington for two purposes—one the distribution of gas by the various companies and the other, the sales price?

A. Yes, sir.

Q. Didn't Mr. Orr bring up that hearing by insisting he should have equal rights with the others?

A. I don't know who brought up the hearing. We got a notice to go up there.

Q. You requested them to fix the priorities?

A. Yes, sir, we asked them to fix them. We did not know [fol. 179] where we stood; they were claiming large war orders, etc.

Comr. Brasher: How many wells did the Clear Creek Oil & Gas Company have at the time this contract was entered into with the Ft. Smith Spelter Company.

A. We only had one well at that time. We were drilling the second one, I think.

Q. How long were you able to produce gas at a profit of 4 cents?

A. We never were able to produce it at a profit of 4 cents. It has been a losing proposition from the time we started. We thought we could.

Mr. Daily: Mr. Brasher asked you how many wells you had when you entered into the contract with the Ft. Smith Spelter Company. That was the same proposition when you entered into the contract with the Arkansas Zinc & Smelting Corporation?

A. Yes, sir.

Comr. Brasher: Can you state approximately, or exactly, if you know, what it really cost you at that time to produce gas?

A. No, sir, I could not. I figured on it once when I was handling the affairs of the company, and as near as I remember I figured the cost the first year was around 4.80 something, and later I figured it around 6 something. We had a lot of customers that were paying us much higher rates, and the gas that we were getting 12 and 15 cents for entered into the average cost, whereas the smelters were consuming 80 to 85 per cent at 4 cents.

(Witness excused.) (Tr., 201-219.)

[fol. 180] E. G. Hothorn, witness for respondents, after being duly sworn, testified as follows:

Mr. Daily: Your name is E. G. Hothorn?

A. Yes, sir.

Q. Where do you live?

A. In New York.

Q. You are President of the Arkansas Zinc & Smelting Corporation?

A. Yes, sir.

Q. Have you that memorandum contract with you? When did

you go to Fort Smith with reference to the location of a smelter, if you did go?

A. March 15, 1916.

Q. You were in this part of the country looking for a location?

A. Yes, sir, in Poteau, Oklahoma.

Q. How far is that from Fort Smith?

A. About forty miles South.

Q. How did you happen to go to Fort Smith.

A. Some friends of mine offered me a gas contract at Poteau.

Q. How did you happen to go to Fort Smith, if you did go

A. I found when I went to make the contract that they had so many prior contracts that mine was not sufficient enough to build a smelter on.

Q. How did you come to go to Fort Smith?

A. On the car I read about having found large gas field here. I stopped at Fort Smith for curiosity sake and went in to see Mr. Robertson there.

Q. When did you enter into this memorandum agreement, if you did enter into it?

A. March 18, 1916.

Q. Was that supplemented by this instrument of March 21, 1916?

A. Yes, sir.

[fol. 181] Q. Look at it and see if that is the one? (Hands witness a document.)

(Mr. Daily reads the agreement referred to dated March 21, 1916. Same is filed with the records of this case.)

Mr. Daily: The Mr. Robertson referred to, is that this Mr. Robertson here?

A. Yes, sir.

Q. Mr. C. E. Speer was a director of the Clear Creek Oil & Gas Company?

A. Yes, sir.

Q. And a copy of the contract with Buck & Kerr was attached?

A. Yes, sir.

Q. This statement I have read, plus the memorandum of March 18, 1916, did that contain the terms of agreement between your company?

A. Yes, sir.

Q. The memorandum agreement was afterwards formally reduced to writing, in one instrument containing all the terms?

A. Yes, sir.

Mr. Daily: I would like for the record to show here that I asked Mr. McGehee to produce the original of March 18th, to which this refers, and he was unable to find it. That is a fact, Mr. McGehee?

Mr. McGehee: Yes, sir.

Mr. Daily: You intended to bring with you a copy of the agreement of March 18th.

Witness: Yes, sir, and my Secretary forgot to attach it.

Mr. Daily: Instead of that he gave you another contract? It

was not the one you intended to bring? The original of March 18th you haven't located that?

A. No, sir.

Q. Will you send to the Commission, to file in the records of this case, verified by your affidavit, a copy of the memorandum [fol. 182] agreement of March 18, 1916, to which this memorandum of March 21st refers?

A. Yes sir.

Mr. Daily: May I have the permission of the Commission to do it?

Comr. Wood: Yes sir.

Reporter's Note: Same appears as "Exhibit 2" Hothorn.

Mr. Daily: After these memorandum agreements were entered into, did you proceed immediately, without any other formal execution, towards the construction of your smelter?

A. Yes, we went right out and looked at a site at Fort Smith, just across the river in Van Buren, and finding we — make good railroad switching, we made deal with the town of Van Buren and started to work on April 11th to build.

Q. The formal contract was not actually executed until May 3rd?

A. No sir.

Q. After the execution of this second memorandum of March 21st, did you stay in Fort Smith?

A. No sir.

Q. You went back to New York?

A. Yes sir.

Q. Did you ever come back until the smelter was constructed?

A. Early in July.

Q. What year?

A. 1916.

Q. The erection of the plant was started on this memorandum contract signed by both companies?

A. The plant was virtually finished in 71 days. On June 27th we made the first running.

Q. How much did your company invest in that smelter?

A. $307,000.00.

Q. Would you have built that smelter except for the execution [fol. 183] of this contract with the Clear Creek Oil & Gas Company?

A. No sir.

Q. Was the inducement contained in that contract 4 cent gas, what brought you to Fort Smith?

A. Yes sir, I could get sufficient gas there at 4 cents. I could get it at Clinton at that time for 3 cents.

Q. You continued to operate under that contract from that date until the present time?

A. Yes; we have a strike now.

Q. You are not operating at present because of a strike?

A. Yes sir.

Q. That has been since the last hearing at Fort Smith?

A. Yes, the men claim they haven't struck, but have suspended operations.

Q. At any rate they are not working?

A. No sir.

Q. Are you still taking gas?

A. A little of gas to keep the furnaces going.

Q. There was something said at Fort Smith by Judge Hill with reference to a ten inch pipe line being specified in your contract. Do you recall if it was a fact that a ten inch pipe line was specified in that contract?

A. They stated that for such a large contract calling for *for* such a large quantity of gas with Ft. Smith Spelter Company they wanted to have a pipe large enough to supply both plants.

Q. Do you recall whether the contract provided for an option on the part of the Ft. Smith Spetler Company of 12 million feet?

A. I think the contract calls for that.

Q. Under the terms of the contract your right to take gas was subject to the rights of the Buck contract?

A. Yes sir.

Q. And provided you furnished them $45,000 in cash, to be repaid in gas. Have you furnished that $45,000?

[fol. 184] A. Yes sir.

Q. It has been repaid by them in gas?

A. Yes sir.

Comr. Wood: Do you know anything about the operating conditions?

A. In what way?

Q. In the production of gas?

A. I think so.

Q. What would you say, from your knowledge of conditions, that gas can be produced for now? Could it be produced at the price at which you made the contract in 1916?

A. It could.

Q. At 4 cents a thousand cubic feet?

A. Sure.

Q. At a profit to the gas producing company?

A. Yes sir, Mr. Robertson emphasized that any number of times, that he could make plenty of money at four cents.

Q. Do you think it could be done now?

A. Yes sir.

Q. Do you mean simply produced, or delivered?

A. All, the production and delivery costs, both. *A.* What quantity? You know the delivery is a very substantial item. Delivered at our smelter, I think we could deliver gas at our smelter at considerably less than 4 cents. We have some leases near the plant now, which, in the opinion of gas experts, should furnish gas for our smelter for a long time, and I think we need a very small pipe line, a 4 inch pipe line from the Kibler field would be amply sufficient. I don't think I need to go very far to get gas very near 4 cents today.

Q. Do you think gas can be delivered now at the same cost per cubic foot that it could be delivered in 1916?

A. I think it could, even cheaper, because today the field is so well developed that you don't have to do much experimental drilling to know where to put down wells. At that time you had to do [fol. 185] more or less experimenting in locating wells; I think the field has been much better determined.

Q. Did the cost of gas enter into the location of your plant at Fort Smith?

A. Exclusively; at that time most of the smelters were not paying even 4 cents.

Q. Why didn't you locate at Clinton if you could secure gas at 3 cents?

A. I was afraid of the freight line. It is only on a spur of the Midland Valley, Ft. Smith & Western, and I was not quite sure about the water at Clinton. We went also to Eufaula and other places. I want to mention, the statement has been made that the smelters in Oklahoma were paying 10 cents for gas. There is no one smelter that pays more than 7 cents for a majority of the gas. I investigated that. I especially asked the American Zinc Institute and not one associated with them were paying more than 7 cents.

Q. You are familiar with the cost of the operation of your smelter per month?

A. Yes sir.

Q. Will you say that you can operate your smelter, eliminating the question of the cost of gas, at the same cost that you did in 1916?

A. No; in fact, that has been the trouble all the time here.

Q. The cost of labor has gone up materially?

A. Our labor is $7 a ton, I think, now higher than it was in 1916, and we have a strike on that account because the men are not satisfied with the rate the Fort Smith smelters pay.

Q. Has anything else gone up?

A. Coal has gone up.

Q. Anything else?

A. I think our cost in 1916 was 15 and something and I think it will approximate now almost $25.

[fol. 186] Q. Can you think of any costs that have gone up in the production and delivery of gas?

A. I think it costs a little more to drill a well, but Mr. Commissioner, that is largely off set by the fact that formerly you drilled dry wells, and you don't need to do that now. You know exactly where to put your well, and you don't lose so much. Where formerly you had to drill 10 wells, you now put down 5 or 6. They may cost a couple of thousand dollars more.

Q. Won't they have to continue to explore new territory if that field is exhausted?

A. So far as I understand now, they have so much gas they don't know what to do with it, and they have the pipe line in.

Comr. Brasher: Is there anything in this contract that prohibits you from developing the leases you have and furnishing your own plant?

A. In the contract is a clause that if these gentlemen cannot

produce enough gas they can turn over their leases to me and put it up to me.

Q. If that cost of production and delivery was greater than the revenue received, they would not be able to exist on that, would they, if it costs more to deliver it to you than you are paying for it?

A. They have not as yet exercised their option and notified me that they cannot deliver it.

Q. They have not released you to that extent?

A. No sir, I am obligated to pump if they cannot furnish the gas. It is all provided for, because I had the contract recorded, and it is provided that as soon as the gas cost would be too high for delivery they can turn it over to me.

[fol. 187] Q. And you can furnish your own gas and take all the risk? You mean they are — turn the lines and leases all over to you?

A. That is all provided for.

Mr. Daily: You have about how many men working at your plant?

A. Something like 200.

Q. Possibly not over 5 or 6 working for the Gas Company or 10 or 15 when they are drilling?

A. I don't know how many men they have.

Q. A small amount compared to your 200?

A. Yes sir.

Q. Your labor cost is a big item?

A. Two-thirds of the cost.

Q. Has spelter gone up or down?

A. Just now spelter has gone down so much there would not be any money at all in it.

Q. Mr. Fitzgerald has prepared figures based on the life of the gas field being six years, or exhausted in two years. If the gas field is exhausted in two years from this time, will your smelter have been operated at a profit or a loss?

A. I think that in two years from now we ought to have the value of our smelter back.

Q. But no interest on your investment?

A. We have paid 7 cents, I think. We haven't got the value of the smelter back yet.

Q. If it does play out in two years, you will have the value of your smelter back and 7 per cent on your investment.

A. Yes sir. The smelter has not been making money, but we have been successful in buying and selling ore. We made a profit of $120,000 in buying ore.

Judge Hill: What would be the difference in the price of gas if you took it at 8 ounce pressure and 10 lb. presure? If you took your measurements on an 8 ounce pressure and a 10 lb. pressure?

[fol. 188] A. I don't know.

Q. It would make quite a large per cent difference in the price?

A. I do not know, I am not a gas expert.

Q. You say you were looking into conditions in the Oklahoma field. Do you know what they charge for gas in Henrietta, Oklahoma?

A. Yes sir.
Q. How much?
A. 7 cents.
Q. When did you get that information?
A. Mr. Prater (?) told me he recently made a contract with the —— plant to furnish them gas at 7 cents.
Q. Was that before April 2, 1920?
A. No, maybe just a little bit later. He drilled a couple of wells and sold the competing company gas at 7 cents.

Judge Hill: I wish the Commission would write the Oklahoma Corporation Commission, I have a letter from them giving the scale of gas prices paid by the smelters at from 10 cents up.

Q. Has not the Oklahoma Commission fixed the minimum rate at 10 cents?
A. I don't know, but they are getting it at 7 cents, and the Labor Commissioner told me they were getting gas at 7 cents.

Judge Hill: I wish the Commission would write to the Oklahoma Commission. He got his information from the Labor Commission.

A. I said that a man who sold the gas told me that. I know that the —— plant is paying 5½ cents now for a majority of their gas.
Q. You say that gas can be produced in the Kibler field in Crawford County for less than it is?
A. I think so.
Q. You contracted with Mr. Martin's company to get two thirds of your gas from them at 4 cents in 1916?
A. Yes sir.
A. You are now paying him nine, are you not?
[fol. 189] A. Unfortunately, I am.
Comr. Brasher: When you entered into this contract, you say you could have purchased gas equally as cheap in other places. If you could have done so, it would have been under the same conditions that existed here? If you had entered into a contract for a commodity over which the state has control, if it is found that we have control, then that same condition would possibly prevail in the other territories and the contract would be subject to State regulation, would it not?
A. I tell you, you know California people tried to regulate the price of gas, and they are getting their gas considerably cheaper than 7 cents. At Clinton, Oklahoma, they are getting it for 4 cents.
Q. Is that company a public utility that is furnishing them?
A. They have their own gas. I have my own leases now that I can produce gas.
Q. Taking it for granted that the figures of this Company are correct as to the cost of producing gas, then you would not likely be receiving gas from them today but for the support given the company by their other customers at higher rates?
A. No sir, I think they done me great injury to take on — num-

ber of other contracts. I protected severely against them taking on the Athletic Smelter. If they had not taken any other contracts but mine they could have put in a 4-inch line, which would have cost them $35,000 and these wells would be running yet.

Comr. Brasher: It does, of course, look like you made a rather advantageous contract with them.

A. I located advantageously, because I knew the distance made a big difference to put down a 10-inch pipe line to push the gas 17 miles, rather than to have a four-inch line and have nobody. They did not say anything about a public commission, or anything, just wanted to lay a pipe line to our plant. I can get in Shreveport, Louisiana, hundreds of millions of feet of gas at 3 cents, but their [fol. 190] location on the freight on the ore from the Joplin District would offset the difference. There is any quantity of gas down South where there is no market whatsoever.

Judge Hill: You can't get the ore to it?

A. We could get the ore from Mexico. Ultimately, there are people figuring on putting smelters there, figuring and hoping that Mexico will be settled.

Q. You did a little prophesying yourself when you put down a smelter for $300,000 and only one gas well had been drilled?

A. I may have taken Mr. Robertson's gas statements as correct.

Q. You knew there was just one well there, didn't you?

A. No, I don't know whether I knew there was just one well or not.

Q. Just look at your contract; it says they had one well.

A. But they had 75,000 acres of land.

Q. They had one well when you made that contract?

A. Yes, and I sent my own expert to look over the gas field and he reported favorably.

Q. You knew more about it than Mr. Robertson?

A. He would not have admitted it at the time.

Q. You had an expert that reported favorably?

A. Yes sir, Mr. Fred Hardin, reported favorably on it and I had another man.

Q. You looked into the gas situation thoroughly?

A. Yes sir, otherwise I would not have put $300,000 of my money in there.

Q. And they had no pipe line when you located there and borrowed money from you to build a 10 inch pipe line?

A. Yes sir.

Q. You knew they were going to construct a ten inch pipe line to South Ft. Smith?

A. I believe they said that?

Q. You knew this other concern was going there, 22 miles away? [fol. 191] A. Yes, sir.

Q. Don't you regard it more expensive to deliver gas to South Ft. Smith than to Van Buren?

A. Yes sir.

Q. How much difference?

A. 30 to 40 per cent.

Q. Didn't you frequently state that you would be willing to increase the price of gas to 8 cents if the other smelters would?

A. At one time when the gas looked like it was running low, I believe I stated that.

Q. You stated it repeatedly?

A. I would not do it today.

Q. I am asking you what you offered to do in the past. You have offered to pay eight cents if the other smelters would pay it, but you would not unless they would pay it? Was not that your position?

A. At one time they stopped drilling and had me with the big investment, which I was afraid of losing, and I wanted to build them any kind of a golden bridge to get my money back.

Q. Please answer the question?

A. No sir; I offered to pay them an increased price but never eight cents.

Q. Didn't you offer to pay the same as the others would, but you would not pay any more?

A. Yes sir.

Q. You admit that the cost of delivery to them would be 30 per cent more than delivering to you?

A. Yes sir.

Q. And yet you wanted your competitors to pay the same price as you?

A. Unfortunately they had a prior contract.

Q. Your agreement was that you would increase the price as much as they would, but no more.

—. ——.

Comr. Wood: You knew when you were dealing with this company that you were dealing with a quasi-public corporation?

[fol. 192] A. No sir, I never hear anything. They sued us in court and never said a word until recently they had that public Service corporation. In fact, I was told by a gentlemen that that would be the next thing, that they would make this public service corporation try to put up a higher price of gas.

Q. You did not know that they held themselves out as a public service company?

A. They never said a word about it until recently, after this lawsuit was decided, and I saw Mr. ——, and he said, "You had better compromise; that is the next step they will take, somehow to get the Arkansas Corporation to cancel their contract." I considered it with my lawyers and they told me they had no right and there was nothing to it.

Judge Hill: Did Mr. Robertson give you a copy of the letter I wrote him in May 1918 giving an opinion that they were a public service corporation, and that the preferences would be void if a third party would resist it?

A. I don't remember it. My memory is not as good as it used to be.

Q. You don't deny it?

A. If you will show me the letter?

(Hands witness letter heretofore copied in this record.)

Q. Do you remember having seen it? You don't deny that Mr. Robertson gave you a copy of that and discussed it with you? Answer that question. Do you deny that Mr. Robertson gave it to you and discussed it with you?

A. I don't remember anything about it.

Q. You knew that the company was taking on glass factories in Ft. Smith, two of them didn't you? supplying Mr. Parke's and Mr. Zenos' glass factories?

A. I believe I heard something about it.

Q. Don't you know they took on a great many industries in and [fol. 193] about Ft. Smith and South Ft. Smith?

A. They did not notify me officially.

Q. Didn't you know it, though; didn't you keep in very close touch with the situation?

A. In what way?

Q. The whole way?

A. I cannot keep in close touch with you; you are changing every day.

Q. Don't you keep in close touch with the operating conditions of your plant?

A. Yes sir.

Q. And the contracts that affect it?

A. In what way?

Q. I am asking you if you did not know that the Clear Creek Oil & Gas Co. was supplying a great many customers in Ft. Smith?

A. I have protested to Mr. Robertson time and again that he was developing and making contracts that were injuring our investment.

Q. You knew that he was taking on other customers?

A. I think I did, and protested it.

Mr. Daily: At the time you signed this contract with the Clear Creek Oil & Gas Company were they furnishing gas to anybody?

A. They had one well, just showed it to me.

Q. Did they have any pipe line?

A. No sir.

Q. Were they furnishing gas to anybody whomsoever?

A. No sir.

Q. Had they made any contract so far as they represented to you, except the contract with Buck & Korr?

A. That was the only one.

Q. They represented to you at that time that they had contracted to sell gas to nobody except Buck & Korr, and upon that basis you entered into that contract?

[fol. 194] A. Yes sir.

Q. All this other selling of gas has been subsequent to the time you entered into that contract?

A. Yes sir, and I publicly recorded this contract so that nobody could make a contract afterwards and claim that they did not know it.

Q. This formal contract signed on May 3rd by both them and you was recorded in both Sebastian and Crawford Counties?

A. Yes sir; it was a lien upon the pipe line.

Q. That was on May 3rd? At that time had the pipe been constructed to your smelter?

A. No sir.

Q. At that time they were not furnishing gas to any one?

A. No sir.

Comr. Wood: They represented to you that they were strictly a private company and did not intend to serve the public?

A. They did not say one word about it, they said you are the first on the line, the first on their line from their wells to me. They said, "We are going to furnish the town of Van Buren, that will come afterwards and then we will have to go over the bridge and we will have to go away out there."

Q. Away out where?

A. South Fort Smith.

Q. Then they indicated to you that they were going to serve some one else?

A. No, they said, "We are going to preserve the gas to the two smelters," and I protested violently when they made the contract with the other smelter. He persuaded them that he had gas enough to furnish them all forever and forever, and had plenty even for the Athletic smelter. He said that they had gone into a careful investigation of the field and that there would be plenty of gas for many years to come and we need not worry at all.

Q. You considered that you were dealing with a private company that had a right to make a private contract without the police power [fol. 195] of the State being interjected?

A. What did the police power of the State have to do with a contract to furnish gas? They might as well furnish money.

Q. You had no idea that a corporation could enter into a thing like that?

A. Absolutely not. I would not have dreamed of making anything subject to a political organization. I could not afford to make a contract where a political organization could come in afterwards——

Q. What do you mean by a political organization?

A. I mean a political organization controlling local matters against eastern interests.

Q. The police power of the State, I am talking about?

A. I would not know what the police power of the State was. I made a contract and furnished certain money and never anything said about police power, not a word said in the contract about it. At that time nobody dreamed—a public service corporation never had taken up that question.

Comr. Wood: Every State in the East, the Central or West portion of the United States has police power, regardless of the location of the State.

Witness: I did not know a State has police power to infringe or set aside private contracts.

Comr. Wood: You just thought you were dealing with something not subject to the police power of the State?

A. I had no idea. I submitted the contract to our lawyers, to

one of the lawyers, that is now chief attorney for the Sinclair Oil Company. I had made gas contracts for a number of years and never been the question come up any way of public service corporation changing the price of gas. I had made contracts in Iola and Oil Junction. I been expecting something going to happen in Oklahoma. I did not know anything about it at that time; I did not dream that you had a right to change a private contract.

[fol. 196] Comr. Wood: That is what we are all trying to find out.

Witness: My lawyers in New York claim you haven't.

Comr. Brasher: Quite likely, and that will be settled later.

(Witness excused.) (Tr., 286-304.)

[fol. 197] E. G. HOTHORN, recalled by respondents, testified as follows:

Mr. Daily: I will ask you if on May 1, 1920 Mr. Cazort offered to sell you all the gas you wanted there at 6½ cents?

A. Unconditionally. It was addressed in care of the Commission and they returned it to me.

Q. You know why? He has a large acreage?

A. I have been told he has 3,000 acres.

Judge Hill: Have you accepted his proposition?

A. Not at all.

Mr. Daily: You have a contract with the Clear Creek Oil & Gas Company by which you are to take your supply of gas from them?

A. Yes sir, and the Wild Cat too.

Comr. Wood: Does that include the pipe line and delivery to you for 6½ cents?

A. Yes sir, I did not ask him for anything. He sent it in to the Commission so I could use it here.

Mr. Daily: Will you read the letter now?

(Witness reads letter, same marked "Exhibit 1 (Hothorn)" and filed.)

Comr. Wood: It appears that if the Commission should find that the the public interest and the cost of production would warrant the sale of gas at a figure not less than eight cents per thousand cubic feet, then you could very easily make a contract at 6½ cents with other parties and you would not be damaged so much?

A. Yes sir, we would be damaged 2½ cents.

Comr. Brasher: If the Commission finds that it has a right under the police power of the State and that it is its duty to exercise that right, and finds from the evidence before it that it costs more than four cents to produce gas, then it is not your position that this Commission should require the other consumers to pay the loss sustained by furnishing your Company gas at four cents, is it?

A. I really cannot answer that. I believe I leave that to my attorneys. (Tr., 307-308.)

[fol. 198] EXHIBIT IN EVIDENCE

In the Matter of THE CLEAR CREEK OIL & GAS COMPANY on Petition for Rights to Lay Lines on County Roads

Be it remembered:

This matter comes on this day to be heard upon the petition of the Clear Creek Oil & Gas Company for an order granting it permission to lay and maintain its pipe lines along certain public roads in Crawford County, and that laterals from gas wells to a connection with its said pipe line and the Court having heard the petition and the testimony introduced and having received the engineer's plat, or blueprint of said proposed pipe line attached to said petition and filed therewith, and being well and sufficiently advised in the premises, doth grant the prayers of said petition upon the conditions hereinafter set out:

Whereupon it is considered, ordered and adjudged by the Court that permission be, and it is hereby granted, to the Clear Creek Oil & Gas Company, an Arkansas Corporation, to lay and maintain its pipe line along the public roads of Crawford County as shown upon the Engineer's plat, or blue print filed herein, beginning at the half section corner on the north line of Section 33, Township 9, north of Range 30 West, Crewford County, Arkansas, running thence west on or near said section line between these and other sections and along the public roads on lines between Sections 28 and 29 leave the east and west road at the intersection of the north and south road between sections 28 and 29 and run north one mile to Kibler Road, thence west to the city limits of the City of Van Buren, so far as the rights of the public are concerned in said public roads; upon the expressed conditions:

One. That said Company may lay and maintain lateral lines along the public highways of Crawford County where it becomes necessary to connect its own wells, or other wells, with its main pipe line.

Three. All pipe lines shall be laid and maintained not less than 16 inches (sixteen inches) below all grades and cuts on said public road.

[fol. 199] Two. The main line of said Company shall be laid and maintained on the south side of the public roads, as shown on said blue print;

Four. No dirt or other material excavated in the laying of said pipe lines shall be left so as to obstruct or endanger travel upon said public roads, but must be removed or otherwise disposed of at the expense of said company;

Five. All pipe line is to be laid and maintained as close to the drain ditch of said public roads as is reasonably possible.

Six. All excavations made by said Pipeline Company in laying its pipes to be filled and kept filled; and if any such excavation or ex-

cavations, at any time wash out or sink down, said Company shall refill them at once upon written notice served upon said Company by the Road Overseer having charge of said road and if said Company fails or refuses to fill said washout or sunken excavation promptly upon service of said notice, then said road overseer shall refill them at the expense of this company.

Seven. If said Clear Creek Oil & Gas Company suffer its pipelines upon said public roads to get out of proper repair and they are permitted to remain out of repair so as to become a source of danger to the public using such public roads, the privilege and permission hereby granted to lay and maintain said pipe line along said public roads may be revoked by the Court upon proper showing;

Eight. No right herein given shall be construed as permitting the said Clear Creek Oil & Gas Company to use any public bridge upon which to lay its pipe line, or as granting any right beyond or other than the interest of the public in such roads.

Nine. The privilege hereby granted shall not be construed as exclusive.

(Signed) John B. Brown, Special Judge.

[fol. 200] STATE OF ARKANSAS,
County of Crawford, ss:

I, Chas. T. Steele, the regularly elected, qualified and acting Clerk of the County and Probate Courts of Crawford County, Arkansas, hereby certify that the foregoing typewritten sheets Numbered one and two, are a true, and complete copy of an order of the County Court made April 5th, 1916, and now appears of record in County Court Record "J" at page 247 of the Records of this Office.

Witness my hand and official seal this 19th day of April, A. D. 1920.

(Signed) Chas. T. Steele, County Clerk, by William C. Woes, D. C. (Tr., 46-49.)

[fol. 201] EXHIBIT IN EVIDENCE

ORDINANCE No. 1151

An ordinance granting to the Clear Creek Oil & Gas Company, a corporation organized under the laws of Arkansas, its heirs, associates, successors and assigns, the right to erect, maintain, and operate a system of pipes for the conveyance of natural gas for heating, lighting and furnishing power for manufacturing and other purposes for public of private use, in the city of Fort Smith, Ark., and granting to the said Clear Creek Oil & Gas Company, its heirs, associates, successors, and assigns the right to use the streets, alleys, avenues and public grounds of said city for such purposes.

Be it ordained by the Board of Commissioners of the City of Fort Smith, Arkansas:

Section 1. The right is hereby granted to the Clear Creek Oil & Gas Company, its heirs, associates, successors and assigns, to erect, maintain and operate a system of pipes for the conveyance of natural gas for furnishing heat, light or power, or all, for public or private use in the City of Fort Smith, Arkansas, for the period of thirty-seven and a half (37½) years from the passage of this ordinance.

Section 2. For and in consideration of the rights and privileges herein granted to the said Clear Creek Oil & Gas Company, its heirs, associates, successors and assigns, it is hereby expressly stipulated.

(a) That the City of Fort Smith, Arkansas, shall receive two per cent (2%) of the gross receipts from the sale by the said Clear Creek Oil & Gas Company, its heirs, and assigns, in said City, and that settlement with the City shall be made on or before the 20th of each month for all gas sold and collected for during the preceding month, the right is hereby granted to said City to inspect the books and records of the said Clear Creek Oil & Gas Company, its heirs and assigns, at any time for the purpose of keeping an accurate check on the gross receipts above specified.

[fol. 202] (b) The maximum price to be charged for gas shall not exceed twenty-five (25¢) cents per thousand (1,000) cubic feet for domestic consumption and fifteen (15¢) cents per thousand (1,000) cubic feet for factory purposes, with a minimum charge of fifty (50¢) cents per month to each consumer.

(c) The grantees hereunder shall at all times save the City harmless on account of any damage to persons or property that may occur by reason of the privileges herein granted or the operation hereunder by said grantee or its successors or assigns.

Section 3. The said Clear Creek Oil & Gas Company, its heirs, associates, successors and assigns shall have the right and privilege

of excavating and using the streets, avenues, alleys and public grounds in said city for the purpose of laying, removing, repairing or making connections to mains or laterals used for the purpose of conveying natural gas to any public or private building, lamps, or place during the continuance of this ordinance; provided, however, that said streets, avenues, alleys and public grounds are not left open and torn up an unreasonable length of time, and to be left in as good condition as they were found, and all trenches in improved streets shall be relaid in accordance and in compliance with Ordinance No. 1031, or any amendments thereof which may hereafter be passed, and that all pipes be laid in the alleys where practicable.

Section 4. (a) If the said Clear Creek Oil & Gas Company, its heirs, associates, successors or assigns, shall sell, assign or transfer the privileges hereby granted to them, said sale, assignment or transfer shall contain a provision that said assignees shall perform the conditions of this ordinance, and in the event they shall fail to incorporate such a provision in said sale or assignment, or in the event the said Clear Creek Oil & Gas Company, or its assigns, shall fail to perform the conditions herein set out, then all rights and benefits hereunder shall cease and become inoperative and void.

(b) That no mains constructed under the franchise herein granted shall be used to convey or transport gas under the terms or provisions of any Ordinance heretofore granted which will de- [fol. 203] prive the City of the rights or benefits provided in this ordinance.

Section 5. The privileges herein granted are upon the following conditions: That the grantee herein or its successors, and assigns, shall commence to construct a pipe line for the purpose of conveying natural gas to the City of Fort Smith, Arkansas, within ninety (90) days from the date of the passage and acceptance of this ordinance, and that said pipe line shall be actually constructed to the City limits of said City within six months (6) after the date of the passage and acceptance of this ordinance and that unless the said Clear Creek Oil & Gas Company or its assigns shall lay four (4) miles of pipe line in the City limits of Fort Smith for supplying gas for manufacturing and other purposes, within eight (8) months from the time this ordinance becomes effective, all rights and benefits shall cease and become inoperative and void.

Section 6. The grantee shall have the right to discontinue from its mains any consumers of gas who have not conformed with the rules of the grantee governing the consumption and sale of gas or who are in arrears ten days for the payment of gas furnished during the previous month.

Section 7. It is hereby declared to be unlawful for any person, firm, corporation or association of individuals to tap, break, injure, or molest any gas pipe line, meter, regulator or other appliance or connection belonging to the grantee herein, or any other person

or corporation, or to interfere with the operation of any such gas system or its employes while engaged in the operation, maintenance or use of such system, and any person, firm or corporation or association of individuals found guilty of violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction they shall be fined in any sum not less than five dollars nor more than fifteen dollars and each day the violation shall continue shall be deemed a separate offense.

[fol. 204] Section 8. This ordinance shall be in full force and effect, from and after thirty (30) days after its passage and publication.

Section 9. This ordinance shall be duly and legally accepted by filing with the City Clerk within thirty (30) days after its passage and publication, its written acceptance signed by J. F. McGehee, President, R. S. Robertson, Secretary of the Clear Creek Oil & Gas Company, or their legal representatives.

Passed and signed April 3, 1916.
Henry C. Reed, Mayor. George T. Carnall, City Clerk.

Published in Times Record 4-5-16. (Tr., 86-90.)

[fol. 205] EXHIBIT IN EVIDENCE

Ordinance No. —

An ordinance granting to the Clear Creek Oil and Gas Company, a corporation, its heirs, associates, successors, and assigns, the right to erect, maintain and operate a system of pipes for the conveyance of natural gas for heating, lighting, and furnishing power for manufacturing and other purposes for public or private use in the City of Van Buren, Arkansas, and granting to the said Clear Creek Oil and Gas Company, its heirs, associates, successors, and assigns, the right to use the streets, alleys, avenues, and public grounds of said city for such purposes.

Be it ordained by the City Council of the City of Van Buren, Arkansas:

Sec. 1. The right is hereby granted to the Clear Creek Oil & Gas Company, its heirs, associates, successors and assigns, to erect, maintain and operate a system of pipes for the conveyance of natural gas for furnishing heat, light or power, or either or all, for public or private use, in the City of Van Buren, Arkansas, for the period of thirty-seven and one-half (37½) years from the passage of this ordinance.

Sec. 2. For and in consideration of the rights and privileges herein granted to the said Clear Creek Oil & Gas Company, its heirs, associates, successors or assigns, it is hereby expressly stipulated:

(a) That the City of Van Buren, Arkansas shall receive two per cent (2%) of the gross receipts from the sale of gas by the said Clear Creek Oil & Gas Company, its heirs, and assigns, in said City, and that settlement with the City shall be made on or before the 20th of each month, for all gas sold and collected for during the preceding month. The right is hereby granted to said City to inspect the books and records of the said Clear Creek Oil & Gas Company, its heirs and assigns, at any time for the purpose of keeping an accurate check on the gross receipts above specified.

(b) The maximum price to be charged for gas shall not exceed fifteen (15) cents per thousand (1,000) cubic feet, with a minimum [fol. 206] charge of fifty (50) cents per month to each consumer.

(c) That the said Clear Creek Oil & Gas Company, its heirs, associates, successors and assigns, shall at all times during the life of this Ordinance maintain no higher schedule of prices for consumers of gas in Van Buren, and Van Buren Township, Crawford County, Arkansas, than are now or may hereafter be established for the consumers of gas in Fort Smith, or any other place in Sebastian County, Arkansas, by the grantees herein, to the end that the consumers of gas in both locations may enjoy uniform prices for the gas furnished to them by the said Clear Creek Oil & Gas Company, its heirs, associates, successors, and assigns.

(d) The grantees hereunder shall at all times save the City harmless on account of any damages to persons or property that may occur by reason of the privileges herein granted or the operations hereunder by said grantee or its successors or assigns.

Section 3. The said Clear Creek Oil & Gas Company, its heirs, associates, and assigns, shall have the right and privileges of excavating and using the streets, avenues, alleys and public grounds in said City for the purpose of laying, removing, repairing or making connections to mains or laterals and service pipes used for the purpose of conveying natural gas to any public or private building, lamps, or place, during the continuance of this Ordinance; Provided, however, that the said streets, avenues, alleys and public grounds are not left open or torn up an unreasonable length of time and to be left and put back in as good condition as they were found; that all pipes shall be buried so that the top of the pipe is (18) eighteen inches below the present established grade of such streets, avenues, alleys and public grounds, and in case of a change in lowering the grade of the same by the City, the grantee, or its assigns, shall lower its pipes accordingly to the newly established grade; and Provided, further that no pipe shall be laid on that part of Main Street which is now paved, except at cross streets running north and south, and said pavement shall be put back and restored to as good condition as found.

[fol. 207] Section 4. If the said Clear Creek Oil & Gas Company, its heirs, successors, associates, or assigns, shall sell, assign or transfer

the privileges hereby granted to them, said sale, assignment, or transfer shall contain a provision that said assignee shall perform the conditions and covenants of this Ordinance, and in the event they shall fail to incorporate such a provision in said sale or assignment, or in the event the said Clear Creek Oil & Gas Company, or its assigns shall fail to perform the conditions or covenants herein set out, then all rights and benefits hereunder shall cease and become inoperative and void.

(a) That no mains constructed under the franchise herein granted shall be used to convey or transport gas under the terms or provisions of any ordinance heretofore granted which shall deprive the City of Van Buren, Arkansas, of the rights and benefits provided in this Ordinance.

Section 5. The privileges herein granted are upon the following conditions: That the grantee herein, or its successors and assigns, shall commence to construct a pipe line for the purpose of the conveying natural gas to the City of Van Buren, Arkansas, within ninety (90) days from the date of the passage and acceptance of this Ordinance and that said pipe line shall be actually constructed to the City limits of said City within six (6) months after the date of the passage and acceptance of this Ordinance, and that unless the said Clear Creek Oil & Gas Company, or its assigns shall lay one (1) mile of Pipe line in the City limits of Van Buren for supplying gas for manufacturing and other purposes, within six (6) months from the time this Ordinance becomes effective, all rights and benefits hereunder shall cease and become inoperative and void.

Section 6. Whenever one-half (½) of the consumers of gas, from the place on the grantee's pipe line or system of pipes, from which an extension of the line is asked to the terminus of said extension, shall have entered into a written contract with the said grantee, or its successors and assigns, obligating themselves to take gas from the grantee, or its assigns, for a period of one (1) year, under the schedule of prices then in operation under this Ordinance in said City [fol. 208] and the said consumers shall present a petition to the City Council reciting the execution of said contract by one-half of the consumers along the extension so desired and their willingness to take gas thereunder, then the said City Council shall have the right by resolution to require said grantee, or its successors, associates, and assigns, and they thereby agree, to extend the said pipe line or system of pipes along the street for such extension; and, Provided: That if the consumers along Main Street petition for gas under the provisions of this Section the extension of said pipe shall be along the alleys adjacent to said Main Street, for the purpose of furnishing gas to said consumers; that the grantee herein, or its successors and assigns, shall within ten (10) days from the passage of said resolution place an order for the material necessary to make said extension, and shall actually begin the work of making said extension within five (5) days after the arrival of said material in

Van Buren, Arkansas, and shall prosecute the work thereon diligently until it is completed by laying the necessary service pipes to the curb line, and curb boxes and curb cocks are properly installed, time being of the essence of this Section.

Section Seven. The grantee shall have the right to discontinue from its mains any consumer of gas who is ten days in arrears for the payment of gas furnished during the previous month.

Section Eight. It is hereby declared to be unlawful for any person, firm, corporation or association of individuals to tap, break, injure, or molest any gas pipe line, meter, regulator or other appliance or connection belonging to the *grantor* herein or any other person or corporation or to interfere with the operation of any such gas system or its employees while engaged in the operation, maintenance, or use of such system and any person, firm, corporation or association or individuals found guilty of violating any provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined in any sum not less than five ($5.00) dollars, nor more than fifteen ($15.00) dollars, and each day the violation shall continue shall be deemed a separate offense.

[fol. 209] Section 9. This Ordinance shall be in full force and effect from and after thirty days from its passage and publication.

Section 10. This Ordinance shall be duly and legally accepted by filing with the City Clerk within thirty (30) days after its passage and publication, its written acceptance, signed by J. F. McGehee, President, R. S. Robertson, Secretary Clear Creek Oil & Gas Company, or their legal representatives.

Passed and approved the 25th day of March, 1916.
Mayor, J. D. Hawkins. F. H. Fennessey, City Recorder.
(Tr., 91-97.)

[fol. 210] EXHIBIT IN EVIDENCE

Copy

Ft. Smith, Arkansas, 3-31-1916.

Mr. F. H. Fennessy, Clerk of the City Council, Van Buren, Arkansas.

DEAR SIR: Referring to the Ordinance passed by your Council giving us a Thirty-seven and one half year natural gas franchise in your City, beg to say that the same is accepted by us.

Clear Creek Oil & Gas Company. J. F. McGehee, President.
Attest: A. S. Robertson, Secretary.

Filed in my office the 1st day of April, 1916. F. H. Fennesey, City Recorder. (Tr., 98.)

[fol. 211] BEFORE THE ARKANSAS CORPORATION COMMISSION

Case No. 195

CLEAR CREEK OIL & GAS COMPANY, Petitioner,

vs.

FORT SMITH SPELTER COMPANY, ARKANSAS ZINC & SMELTING CORPORATION, Athletic Mining & Smelting Company, Respondents

ORDER

This case being at issue upon the reasonableness of the rates and charges of the Clear Creek Oil & Gas Company for gas provided in said company's A. C. C. No. 2 cancelling A. C. C. No. 1, the matters and things involved in this case having been investigated by the Commission at public hearing in the cities of Fort Smith and Little Rock, Arkansas, and the Commission, on the date hereof, having made and filed its report herein, which report is hereby referred to and made a part hereof, and it appearing from said report that the present rates and charges of the said Clear Creek Oil & Gas Company for gas furnished through its pipe line to the smelters are unreasonable, unjust and discriminatory;

Now, therefore, after due deliberation, it is ordered:

First. That the Clear Creek Oil & Gas Company should be, and is hereby, required to withdraw from the files of this Commission its A. C. C. No. 2 cancelling original A. C. C. No. 1 and that in lieu thereof it should be, and is hereby, permitted to file as its A. C. C. No. 2 a rate schedule as follows:

For domestic gas for Fort Smith and vicinity, 25¢ per thousand cubic feet.

For domestic gas for Kibler field, 15¢ per thousand cubic feet.

For power and industrial gas: First 300 M cu. ft. 15¢ per M; next 300 M cu. ft. 13¢ per M; next 2,400 M cu. ft. 10¢ per M; all over 3,000 M cu. ft. 8¢ per M.

[fol. 212] Second. That the increase of rates herein authorized shall go into effect the first day of July, 1920, and shall remain in effect for a period of thirteen months unless otherwise ordered by the Commission.

Third. That the said company be required to keep a full and accurate account of the revenues and expenses of its operation and file same with this Commission at the expiration of one year after July 1st, 1920, which report shall be in addition to any other report required by law.

The Commission fully retains jurisdiction of the parties and subject matter of this case to continue, change or modify the rates of said company upon the expiration of said period of thirteen months after the effective date of such rates, or at any other time upon the

evidence and facts now before the Commission together with such other evidence as the company or any interested party may offer.

Fourth. That the Secretary of this Commission shall forthwith serve upon the parties hereto a certified copy of this order and the Clear Creek Oil & Gas Company shall, within ten days from the date of this order, notify the Commission whether the terms of this order are accepted and will be obeyed.

By the Commission.

Guy A. Freeling, Secretary.

July 6, 1920.

Secretary's certificate omitted.

cc Clear Creek Oil & Gas Company, Fort Smith, Ark. Fort Smith Spelter Company, Fort Smith, Ark. Arkansas Zinc & Smelting Corporation, Ft. Smith, Ark. Athletic Mining & Smelting Company, Ft. Smith, Ark. (Tr., 225-228.)

[fol. 213] BEFORE THE ARKANSAS CORPORATION COMMISSION

Case No. 195

[Title omitted]

SUPPLEMENTARY ORDER

It appearing that in the order issued in the above styled case on the 6th day of July, 1920, there appears an error in the rate per thousand cubic feet for power and industrial gas over 3,000 M cubic feet;

Now, therefore, for the purpose of correcting said error it is hereby ordered and directed that the Clear Creek Oil & Gas Company should be, and is hereby, required to file with this Commission a new schedule for power and industrial gas as follows:

First 300 M cu. ft. 15¢ per M.
Next 300 M cu. ft. 13¢ per M.
Next 2,400 M cu. ft. 10¢ per M.
All over 3,000 M cu. ft. 9¢ per M.

This order is issued for the specific and only purpose of correcting the rate over 3,000 M cu. ft. same appearing as 8¢ when it should have been 9¢ per M.

July 8, 1920.

By the Commission.

Guy A. Freeling, Secretary. (Seal.)

Secretary's certificate omitted.

[fol. 214] cc Clear Creek Oil & Gas Co., Ft. Smith, Ark. Fort Smith Spelter Company, Ft. Smith, Ark.. Arkansas Zinc & Smelting Corporation, Ft. Smith, Ark. Athletic Mining & Smelting Company, Ft. Smith, Ark. (Tr., 229-230.)

[fol. 215] BEFORE THE ARKANSAS CORPORATION COMMISSION

Case No. 195

[Title omitted]

SUPPLEMENTARY ORDER

Now on this day comes to be considered the application of the Clear Creek Oil & Gas Company to modify the original order of the Commission in the above styled case as it affects the rate to glass companies and industrial consumers other than smelters.

After due consideration and deliberation, the Commission concludes that it would be justified in fixing a separate rate for glass companies as it appears from the motion they operate differently from other industries in that the operation of the glass companies is not continuous the year round. The Commission is, therefore, of the opinion that the Clear Creek Oil & Gas Company should be permitted to file a separate schedule of rates applicable to glass factories for all gas consumed of 10 cents per thousand cubic feet.

After due consideration and deliberation, the Commission concludes that it would not be justified in changing the former schedule as found reasonable by this Commission in its application to smaller industries. With the exception of the glass factories, the Commission is of the opinion that the rate found reasonable in the original order should apply to all industries alike, large as well as small that operate in every month of the year.

In prescribing this schedule of reasonable rates for application by the Clear Creek Oil & Gas Company, the Commission has before it only the operating expenses and revenues of the Clear Creek Oil & Gas Company and bases a rate that it seems reasonable upon the record now before it in this case. The Commission does not deem the [fol. 216] question of discrimination by reason of other utilities having different rates properly in issue here and in fixing this rate for the Clear Creek Oil & Gas Company, it is not attempting to fix what might be called a reasonable rate for all utilities operating in the same locality. The Commission concludes that it should deny the application to modify in so far as it appertains to changing the application of the rate to smaller industries.

It is, therefore, on this day ordered and directed:

That the Clear Creek Oil & Gas Company should be and is hereby required to file with this Commission a schedule for power and industrial gas as prescribed in the original order to apply to all industries with the exception of glass factories.

It is further ordered and directed: That the Clear Creek Oil & Gas Company should be and is hereby required to file with this Commission a schedule to apply to glass factories as follows: For each thousand cubic feet of gas furnished 10 cents.

The Commission retains jurisdiction of the subject matter herein and the parties hereto for the purpose of issuing such further orders as to it may appear necessary and just.

The Secretary is required to serve forthwith a copy of this order upon the Clear Creek Oil & Gas Company and the said Clear Creek Oil & Gas Company shall notify this Commission within ten days whether the terms of the order will be complied with.

Said Clear Creek Oil & Gas Company shall, within ten days from this date, file the schedule of rates as found reasonable in this order for application. Said rates to be in full force and effect from and after the first day of July, 1920.

By the Commission.

Guy A. Freeling, Secretary.

July 14, 1920.

[fol. 217] Secretary's certificate omitted.

[fol. 218] BEFORE THE ARKANSAS CORPORATION COMMISSION

Case No. 195

[Title omitted]

SEPARATE PETITION FOR REHEARING OF FORT SMITH SPELTER COMPANY

Now comes the respondent and files this its application, in writing, for a rehearing, and for grounds for said rehearing says:

First. Because the decision and order of the Commission in fixing rates to be paid by this respondent is contrary to the evidence.

Second. Because the decision and order of the Commission in fixing rates to be paid by this respondent, is not supported by the evidence.

Third. Because the rate fixed by the order and decision of the Commission to be paid by this respondent is higher than is warranted by the evidence.

Fourth. Because the decision and order of the Commission impairs the obligations of the contract between respondent and the Clear Creek Oil & Gas Company, and is therefore violative of and contrary to Article 1, Section 10 of the Constitution of the United States.

[fol. 219] Fifth. Because the decision and order of the Commission impairs the obligations of the contract between respondent and

the Clear Creek Oil & Gas Company, and is therefore violative of and contrary to Article 2, Section 17, of the Constitution of the State of Arkansas.

Sixth. Because the decision and order of the Commission deprives the respondent of its property without due process of law, and is therefore violative of and contrary to Section 1 of Article 14 of the Constitution of the United States.

Seventh. Because the evidence shows that there is a purely private and existing contract between petitioner and respondent entered into at a time when the undisputed evidence shows that petitioner was not a public service corporation in any sense of the word, and the decision and order of the Commission impairs the obligations of that contract, and is therefore violative of and contrary to Article 1, Section 10 of the Constitution of the United States, and Article 2, Section 17 of the Constitution of the State of Arkansas, and each of them.

Eighth. Because the finding of the Commission that the Clear Creek Oil & Gas Company was a public service corporation at the time of the filing of the petition herein, is contrary to the evidence.

Ninth. Because the order of the Commission in that it attempts to fix rates for a natural gas company, is contrary to and violative of Section 10, Article 17, of the Constitution of the State of Arkansas. and of Section 10, Article 19 of the Constitution of the State of Arkansas, and each of them.

Tenth. Because Act No. 571 of the Acts of the General Assembly [fol. 220] of 1919, approved April 1, 1919, in so far as it attempts to authorize the fixing of rates for natural gas and pipe line companies by this Commission, is violative of and contrary to Section 10 of Article 17 of the Constitution of the State of Arkansas, and Section 10 of Article 19 of the Constitution of the State of Arkansas. and each of same.

Eleventh. Because this Commission has no jurisdiction to fix the price which respondent shall pay to petitioner for gas.

Twelfth. Because the rates fixed by the Commission are unjust, unreasonable and discriminate against this respondent.

Thirteenth. Because the Commission had no jurisdiction to determine a purely private controversy between petitioner and respondent in which the undisputed evidence shows that the public had no interest.

Fourteenth. Because the Commission in its decision holds that it is immaterial as to whether the Clear Creek Oil & Gas Company was or was not a public utility at the time it entered into the contract with respondent.

Fifteenth. Because the Commission by its order and decision holds that the purely private contract entered into between these two private

corporations, could be brought under the jurisdiction of this Commission by the subsequent acts of the petitioner in devoting a part of its property to public use without the consent of respondent.

Wherefore, respondent prays that it be granted a rehearing and that the petition of the Clear Creek Oil & Gas Company be dismissed and that pending the decision on said rehearing that the order and decision of the Commission heretofore rendered be suspended.

Daily & Woods and Mehaffy, Donham & Mehaffy, Attorneys for Respondent.

Received July 19, 1920. Arkansas Corporation Commission. (Tr., 313-316.)

[fol. 221] BEFORE THE ARKANSAS CORPORATION COMMISSION

Case No. 195

[Title omitted]

DENIAL OF APPLICATION FOR REHEARING

On this day comes to be considered by the Arkansas Corporation Commission separate petitions for rehearing of the Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation in the above styled case. The Commission having duly considered the petitions and being well and sufficiently advised of the things and matters contained therein is of the opinion that the petitions should be denied.

It is, therefore, on this day ordered: That the petitions of the Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation for rehearing in Case No. 195 should be and is hereby denied.

By the Commission:
July 19, 1920.

Guy A. Freeling, Secretary.

Secretary's certificate omitted.

[fol. 222] AT A REGULAR SESSION OF THE ARKANSAS CORPORATION COMMISSION HELD IN ITS OFFICE AT LITTLE ROCK, ARK., JULY 22, 1920.

Case No. 195

[Title omitted]

ORDER GRANTING APPEAL

On this day came on to be heard the motion of the Fort Smith Spelter Company, and the Arkansas Zinc & Smelting Corporation for an appeal from the order and decision of the Commission herein,

and from the order of the Commission overruling the motion of said respondents for rehearing; and said respondents being entitled, as a matter of law, to the right of appeal.

It is, therefore, by the commission considered, ordered and directed: That the motions of the Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation for an appeal to the Circuit Court of Pulaski County be, and the same are hereby, granted as prayed for.

By the Commission:

Guy A. Freeling, Secretary.

Secretary's Certificate omitted.

[fol. 223] BEFORE THE ARKANSAS CORPORATION COMMISSION

Case No. 195

[Title omitted]

MOTION FOR APPEAL

Now comes the Fort Smith Spelter Company and files its motion for an appeal from the order and decision of the Commission herein, and from the order of the Commission overruling the petition for rehearing, to the Circuit Court of Pulaski County, and the Fort Smith Spelter Company hereby appeals to the Circuit Court of Pulaski County from the order and decision of the Commission herein and from the order of the Commission overruling the petition for rehearing.

Mehaffy, Donham & Mehaffy, Attorneys for Fort Smith Spelter Company.

Received July 22, 1920. Arkansas Corporation Commission. (Tr., 318.)

[fol. 224] IN THE PULASKI CIRCUIT COURT

CLEAR CREEK OIL AND GAS COMPANY, Plaintiff,

vs.

FORT SMITH SPELTER COMPANY and ARKANSAS ZINC AND SMELTING CORPORATION, Defendants

PETITION OF DEFENDANTS FOR ORDER RESTRAINING THE PUTTING IN OF RATES—Filed August 17, 1920

Your Petitioners, who are defendants in the above entitled cause, respectfully show and state that the Clear Creek Oil and Gas Company filed its application before the Arkansas Corporation Commis-

sion against these defendants asking that the Commission declare the Petitioner a public utility and fix rates for gas which defendants should be required to pay.

That said Commission, after hearing the evidence, granted the petition of plaintiff and made an order fixing the rates which defendants would, under said order, be required to pay at nine cents, if they continued to take gas from plaintiff.

That before the Petitioners herein built their smelters, or either of them, the Clear Creek Oil and Gas Company being very solicitous and anxious to dispose of their gas offered contracts to each of the Petitioners and induced the Petitioners to build and operate the smelters and they would not have done so but for the contracts entered into at the time alleged fixing the price of gas at four cents. Copies of the contracts are hereto attached marked Exhibits "A" and "B."

That an appeal to this Court has been applied for and has been granted by the Arkansas Corporation Commission and while a request was made to suspend the new rate the Commissioners stated that it was not their custom to do that but the Court could and doubtless would suspend it until a hearing could be had in the Court. That the transcript of the evidence has not yet been filed, [fol. 225] but will be as soon as the Secretary of the Commission can furnish copies to the Commissioners and can file it in the Court. That the transcript was ordered by Petitioners at the time the motion for rehearing was overruled and the statement above referred to was made by the Secretary of the Commission at the time, and he also stated that as soon as he could do so he would file the transcript with this Court. That as soon as it is possible to do so Petitioners will have the transcript filed in this Court and will be ready to try the case at any time that the Court may be able to hear it.

That unless the order restraining putting in of the new rate is granted by this Court the Petitioners would suffer irreparable loss. That if this Court should decide that the original contracts were binding or that the rate fixed by the Commission was unfair and unjust Petitioners would have no way of recovering back any sums wrongfully paid, whereas, if the order restraining the rate is granted these Petitioners offer to give any bond that may be required by the Court securing the payment of any sums fixed by this or any other Court.

Petitioners also attach hereto copy of motion for rehearing which was filed with the Arkansas Corporation Commission and which sets out the grounds relied on by the Petitioners.

Wherefore, Petitioners pray that an order be granted restraining the putting into effect of the rate fixed by the Arkansas Corporation Commission until a hearing can be had by this Court and for all other and proper relief.

Daily & Woods, Attorneys for Petitioners.

[File endorsement omitted.] (Tr., 398-400.)

[fol. 226] IN THE PULASKI CIRCUIT COURT

[Title omitted]

RESPONSE OF PLAINTIFF TO DEFENDANTS' PETITION—Filed August 17, 1920

Comes the plaintiff, Clear Creek Oil & Gas Company, and in response to the petition for a stay of the order of the Corporation Commission, says:

It is true that the Fort Smith Spelter Company built its smelter after securing a contract with the plaintiff to supply it with gas, and that the Arkansas Zinc & Smelting Corporation built its smelter after contracting with the Wild Cat Company to supply it with two-thirds of its gas and the Clear Creek Oil & Gas Company with one-third, up to three million (3,000,000) cubic feet per day and the remainder to be equally divided between them.

That it is true that they would not have erected said smelters without securing said contracts, and that said contracts have been extremely profitable for the petitioners; and the plaintiff has made no profit whatsoever from said contracts. It has paid no dividends, has a mortgage of over Fifty Thousand Dollars ($50,000.00) upon its property, and owes $10,000.00 or $15,000.00 in addition thereto.

That the Arkansas Zinc Corporation is paying the Twin City Pipe Line Company nine cents (9¢) for the first two million (2,000,000) cubic feet per day, which it uses, and paying the plaintiff four cents (4¢) for the first million cubic feet which it takes from it and for the excess over three million (3,000,000) is paying the Twin City Pipe Line Company six cents (6¢) and is paying the plaintiff four cents (4¢).

That the Athletic Mining & Smelting Company obtains one-fourth of its gas from the plaintiff and the other three-fourths from the Le Flore County Gas & Electric Company, and is paying the Le Flore [fol. 227] Company, either eight or eight and a half cents for three-fourths of its gas, and is paying the plaintiff four cents (4¢) for the remaining one-fourth of its gas.

The Fort Smith Spelter Company's only supply of gas is from the plaintiff and it is paying it four cents (4¢), whereas the other defendants for most of their gas are paying more than double to other companies than they are paying to the plaintiff.

That the Arkansas Zinc Corporation's contract with the Wild Cat Company also provided for four cents (4¢), but it has voluntarily changed that contract and is paying the amount hereinabove stated, but refuses to modify its contract with the plaintiff, although the plaintiff has never failed to promptly furnish all the gas required by its contract.

That to permit the petitioners to pay four cents to the plaintiff while the aforesaid prices are being paid to other companies would operate as a discrimination in favor of the other companies and should not be tolerated by the Court, as all of said other companies, as well as this plaintiff, are public service corporations.

That the petitioners have made large profits in their industries, and notwithstanding that they are paying other companies more than they are paying the plaintiff, they have practically written off their original investments from profits made.

That it is not true as alleged that unless an order restraining the new rate is granted the defendants will be irreparably injured.

That it is not true that should the defendants succeed in having the courts declare the new rates unjust and illegal that they would have no way to recover back their payments and alleges that the defendants have an action at law against the plaintiff to recover the same and that the plaintiff is solvent.

That a few days before the hearing was had before the Commission, Mr. E. G. Hothorn, President of the Arkansas Zinc Corporation, offered the plaintiff $400 per share for its stock of the par value of $100.00, which offer was equivalent to the net valuation [fol. 228] of the property of the plaintiff above its indebtedness of $180,000.00.

That while the plaintiff has large assets, yet its income is insufficient to enable it to do proper development to keep a supply of gas for its customers, and the cost of producing gas increases as the rock pressure of the wells and the volume of the wells decreases, necessitating more wells for a given quantity of gas. Last year the plaintiff's gross income was $103,810.00. Its operating expenses, including rentals and royalties but not including drill of wells, depreciation, etc., was $58,364.00, leaving a balance of $45,446.00.

That the plaintiff's indebtedness exceeds $60,000.00 and without spending any money on development it will take it a year and a half at the present rate to pay its indebtedness and will be conditioned upon the volume of its gas holding out for said length of time, which it will not do without more drilling.

That the plaintiff will have to drill 3 wells within the next few months in order to save valuable leases and in order to supply its present customers with their demands for the coming winter. It has let the contract for the drilling of the three wells and it is dependent upon receiving the increased price of gas in order to pay for the same and keep down its debt so as to avoid foreclosure of mortgage or judgments rendered against it.

That it is to the interest of these petitioners that the plaintiff drill said wells in order that their supply of gas may be maintained and to prevent its competitors from draining the gas under its leases through their wells.

The plaintiff has offered to these petitioners that it will take all sums paid under the schedule above four cents and place the same in the First National Bank of Ft. Smith, Arkansas, in a special account and not draw upon it except to pay for the drilling of said 3 wells.

That the petitioners would not accept plaintiff's proposition and the plaintiff proposes to the Court that it make an order in accordance with this proposition and offers that it will make bond that for all [fol. 229] sums paid for development from said special account that it will give bond to at once restore the same should the petitioners

sustain their contentions in the Court and annul the new rate promulgated by the Corporation Commission.

That in addition to approximately $22,500.00 to pay for three (3) wells the plaintiff will have to purchase pipe line to connect said wells and other wells now in the field in order to get all its gas into its main line and the same will cost $20,000.00.

That the same will go into permanent investment of the plaintiff's property and the petitioners cannot be injured by money in the special account being used for said purpose and it offers if the Court will authorize it to do so to give bond to restore such sum to said fund should the petitioners prevail in their contentions and annul the new rate. The plaintiff offers to the Court that it will make such bonds and give such assurances as the Court may find necessary to protect the petitioners for an immediate refund of the excess over four cents rate should the petitioners prevail.

The plaintiff further alleges that if these defendants pay the schedule promulgated by the Corporation Commission that its remedy for collecting it would be inadequate should it succeed ultimately in this litigation for these reasons, to-wit: The defendants are non-resident corporations and the only property they own in this State are their smelter plants which will be of little value when the gas field is exhausted and are now an insufficient security for the claims which the plaintiff has against them. The plaintiff has a suit against the defendants involving approximately $75,000.00. Many land owners are threatening suits against the smelters for injury to their lands and crops.

Should the Court accept bonds from the petitioners for the payment of the new rate, in the event that the plaintiff is successful, such course would cause the plaintiff further suits to collect upon said bonds and would be an inconvenience, expense and delay to the plaintiff, and thereby prevent it from developing the property which is to the mutual advantage and convenience of both the plaintiff and [fol. 230] the petitioners. The lack of development of the gas field will work an irreparable injury to the plaintiff and said field cannot be developed unless the plaintiff is enabled to collect the new rate from the defendants, and it offers to the Court to make such security as will make the petitioners absolutely secure in a refund of said rate, should a refund be ordered.

Wherefore, having fully answered, the plaintiff submits to the Court that the order of the Commissioner should not be stayed and offers to comply with any terms which the Court may see proper for it to comply with in order to safeguard the petitioners should they ultimately win their contention.

Hill & Fitzhugh, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 231] PULASKI CIRCUIT COURT, SECOND DIVISION, MARCH TERM, 1920, WEDNESDAY, AUGUST 18, 1920

[Title omitted]

ORDER SUSPENDING ORDER OF CORPORATION COMMISSION

Now on this day come the parties to this suit and the defendants file their applications for an order suspending the order and decision of the Arkansas Corporation Commission, and it appearing to the Court that the plaintiff, Clear Creek Oil & Gas Company has had reasonable notice and are present at the hearing, and it further appearing to the Court that the order and decision of the Corporation Commission should be suspended until the final hearing of this case.

It is now therefore considered, ordered and adjudged by the Court that the order and decision of the Arkansas Corporation Commission fixing the rate to be paid by defendants for gas, be suspended until the final hearing of this case upon the defendant, Fort Smith Spelter Company's filing a bond to be approved by the clerk of this Court in the sum of Fifteen Thousand Dollars ($15,000), and the Arkansas Zinc & Smelting Corporation's filing a bond to be approved by the clerk of this Court in the sum of Six Thousand Dollars ($6,000), each of said bonds to secure the payment by each of said companies of the difference between the contract price to-wit: 4¢ per thousand cubic feet, which they are now paying and the amount [fol. 232] found to be just by the Court, if there should be any difference, and it is further ordered, adjudged and decreed by the Court that the smelters shall pay, and the Clear Creek Oil & Gas Company shall receive the amounts now fixed by the contract until the final hearing of this cause.

It is further ordered that this cause be set down for final hearing on the 22 day of September, 1920. (Tr., 408-409.)

[fols. 233 & 234] IN THE PULASKI CIRCUIT COURT

[Title omitted]

SEPARATE BOND OF FORT SMITH SPELTER COMPANY FOR $15,000—Approved and filed August 20, 1920; omitted in printing

[fol. 235] PULASKI CIRCUIT COURT, SECOND DIVISION, SEPTEMBER TERM, 1920, MONDAY, DECEMBER 13, 1920

14076

CLEAR CREEK OIL & GAS COMPANY, Plaintiff,

v.

FORT SMITH SPELTER COMPANY, ARKANSAS ZINC & SMELTING CORPORATION, and Athletic Mining & Smelting Company, Defendants.

JUDGMENT

Now on this day this cause comes on to be heard, and comes the plaintiff, the Clear Creek Oil & Gas Company by Hill & Fitzhugh, its attorneys and come the Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation, by their attorneys, Mehaffy, Donham & Mehaffy, and Daily & Woods, and the Athletic Mining & Smelting Company by its attorney J. B. McDonough Esq. and all parties announcing ready for trial and after hearing and reading all the evidence taken before the Arkansas Corporation Commission in this case and the argument of Counsel, the court doth find in favor of the defendants, Fort Smith Spelter Company, Arkansas Zinc & Smelting Corporation and the Athletic Mining & Smelting Company, and finds that the order made by the Arkansas Corporation Commission in this case and also the Supplemental Order made by said Arkansas Corporation Commission in this case, should be vacated and judgment given here for said defendants.

It is therefore considered, ordered and adjudged, by the court, that order of July 6, 1920 and Supplemental Order of July 14, 1920, made by the Arkansas Corporation Commission and all orders made by the Arkansas Corporation Commission in the case be and the same are hereby vacated and set aside and the complaint of plaintiff, Clear Creek Oil & Gas Company is hereby dismissed, and that the defendants, Fort Smith Spelter Company, Arkansas Zinc & Smelting Corporation and Athletic Mining and Smelting Company recover from the plaintiff all their costs in and about this suit expended for which execution may issue. (Tr., 419-420.)

[fol. 236] IN THE PULASKI CIRCUIT COURT

[Title omitted]

MOTION FOR APPEAL—Filed December 20, 1920

Comes the Clear Creek Oil & Gas Company and pray for an appeal from the decision of this Court herein rendered on the 13th

day of December, 1920, wherein the Court rendered judgment in favor of the defendants, to the Supreme Court of Arkansas.

Hill & Fitzhugh, Attys. for Clear Creek Oil & Gas Company.

[File endorsement omitted.]

[fol. 237] PULASKI CIRCUIT COURT, SECOND DIVISION, MONDAY, DECEMBER 20, 1920

[Title omitted]

ORDER ALLOWING APPEAL

Comes the Clear Creek Oil & Gas Company and files its motion in writing for an appeal herein, which is by the Court granted.

The parties hereto filed a stipulation to the effect that the authenticated copy of the record of the proceedings in this Court shall contain the original copy of the record of the proceedings before the Corporation Commission, and that this Court shall retain in lieu thereof a copy of the same.

It is ordered by the Court that the Clerk in making up the transcript for the Supreme Court shall incorporate therein the original record from the Corporation Commission upon which this cause was heard in this Court, together with certified copy of all the proceedings herein. (Tr., 422.)

[fol. 238] IN THE PULASKI CIRCUIT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed December 20, 1920

It is stipulated that the Clerk shall transmit to the Supreme Court the original record transmitted to this Court by the Corporation Commission and retain in lieu thereof a copy so that the authenticated copy of the record of the proceedings in this Court shall present the original authenticated copy of the record of the Corporation Commission upon which this cause was determined in this Court.

Given under our hands this, the 14th day of December, 1920.

Hill & Fitzhugh, Attys. for Clear Creek Oil & Gas Co. Mehaffy, Donham & Mehaffy, Daily and Woods, Attys. for Ft. Smith Spelter Co. and Arkansas Zinc & Smelting Corporation. James B. McDonough, Attys. for Athletic Mining & Smelting Corporation.

[File endorsement omitted.]

[fol. 239] IN THE SUPREME COURT OF ARKANSAS, APRIL 18, 1921

No. 280

CLEAR CREEK OIL & GAS CO.

vs.

FT. SMITH SPELTER CO.

OPINION

MCCULLOCH, C. J.: Appellant is a domestic corporation, organized for the purpose of "sinking wells, boring for, providing and transporting crude oil and natural gas, coal, asphalt and any other minerals which may be found in the development of their property," and, asserting itself to be a public utility in the operation of its business of producing, transporting and distributing natural gas, it filed its petition before the Arkansas Corporation Commission on May 13, 1920, praying that a new schedule of rates for the use of gas by smelters and other like consumers be fixed at ten cents per thousand cubic feet. Appellees, Ft. Smith Spelter Company, Arkansas Zinc & Smelting Corporation, and Athletic Mining & Smelting Company, three corporations who are customers of appellant as consumers of gas in manufacturing plants, filed their intervention in the proceedings before the Commission in which they claimed that appellant was not a public utility and that they (appellees) were receiving gas from appellant under private contracts which were not subject to public control by the Commission. There was a hearing before the Commission, the result of which was that the petition of appellant for the regulation of rates was granted by the [fol. 240] Commission over the protests of appellees, but the rate was fixed on a graduated scale according to the amount of gas consumed, and the rate so fixed was approximately nine cents per thousand cubic feet. Appellees then carried the proceedings before the circuit court of Pulaski county by appeal as provided in the statute creating the Arkansas Corporation Commission and regulating its proceedings (Acts 1919, page 411), and on the hearing in that court there was a general finding against appellant on the petition and by the judgment of the court the petition was dismissed. An appeal has been prosecuted to this court.

Section 27 of the Act referred to, provides that there may be an appeal to the circuit court from orders and decisions of the Commission, and that said circuit court shall have the power to "vacate or modify any such order found unreasonable or unlawful, or contrary to the evidence; but no new evidence may be adduced by either party in said court, it being hereby expressly made the duty of all parties to present to the Commission all evidence on which they may wish to rely in the event of an appeal to the said circuit court, and all appeals shall be tried upon the record made in the proceedings before the commission."

Section 28 of the Act provides for an appeal to the Supreme Court and that on the hearing of such appeal "the Supreme Court shall be governed by the procedure, and reviewed in the manner which is now or may hereafter be prescribed by law governing appeals from [fol. 241] chancery courts."

We need not concern ourselves about the particular form of the remedy prescribed by the statute for that question is not discussed here by counsel. It is sufficient merely to observe that the Commission acts in a quasi-judicial capacity and its orders affecting property rights are subject to review by the courts in such manner as may be prescribed by the Legislature. The name given to the method of review by the Legislature is not important, since it is clear that the purpose of the statute was to provide for a review by the circuit court on the record made before the Commission, and also provide for an appeal to this court which latter provision is merely declaratory of the right of appeal conferred by the Constitution.

The real point of the controversy between the parties is whether the contracts between appellant and appellees for the sale and purchase of gas were executed by appellant when it was not acting in any public capacity, as contended by appellee, or whether appellant was from the start a public service corporation and the contracts attempted to confer preferential rights to appellees as consumers. Learned counsel for appellee candidly concede that if appellant was organized as a public service corporation and at the time of the execution of these contracts it was operating as such public utility in the production and distribution of gas that the contracts were void so far as they undertook to confer special privileges [fol. 242] to appellees, and that the schedule of rates for prices of gas is subject to control by the Corporation Commission, even though the statute authorizing such regulations was not passed until after the contracts were executed. It is unnecessary, therefore, to cite authorities on that question. Such authorities are cited on the briefs of counsel.

There is little, if any, conflict in the testimony so far as we regard it as material.

Appellant was organized as a corporation in July, 1914, for the purposes already recited in the foregoing quotation. Soon after its incorporation it acquired leases on a large body of land (30,000 acres or more) in Crawford county, Arkansas, and began explorations for gas. This was in what subsequently became known as the Kibler field, and appellant brought in its first well in November, 1915, with the initial capacity of 12,000,000 cubic feet per day. It had no market for its gas at that time and was seeking a market. Fort Smith and Van Buren, the only two cities of any considerable size in that locality, were already being supplied by a gas distributor which obtained gas from another field. Appellant began negotiating with persons who were seeking locations for manufacturing plants and made its first contract with two individuals, Buck and Kerr, who were succeeded in their rights under this contract by

appellee Fort Smith Spelter Company. This contract was in writing, duly executed on March 17, 1916.
[fol. 243] The contract is lengthy and provides, in substance, that appellant should proceed to develop the gas field in which it had options on approximately 30,000 acres and expected to procure more leases, and furnish the contracting parties with gas to be used in a smelting plant to be thereafter located at South Fort Smith, the price to be paid for the gas being specified at four cents per thousand cubic feet; and further provided that after the first 160 days from the date of the contract appellant would furnish thereunder gas in quantities which the contracting consumers were to receive up to 5,000,000 cubic feet per day and that the said parties should have the right to increase the amount up to 12,000,000 feet a day. It provided that the contracting purchasers should "have the first call upon the gas" produced by appellant from any lands in the counties mentioned, or any other territory which might be acquired by appellant, and that the rights of said parties to be supplied with gas should be prior and superior to any contract or agreement made by appellant with others. There is also a clause in the contract giving the contracting purchasers the right to regulate the percentage flow of gas. Another clause in the contract worthy of mention provided that if the plant of the contracting purchasers should cease to yield a reasonable profit of six per cent on the capital invested that appellant should make a reasonable reduction on the price of gas and that if appellant should sell any gas to any other consumers, except churches, schools, hospitals, or char-[fol. 244] itable institutions, "at a less rate of price than governs this contract, then in such event, second party shall pay for all gas consumed on a price basis equal to such lower price or prices during the entire time they are in effect." Still another clause provided that in case of loss by the contracting purchaser on account of fire, explosion, storm, strikes, etc., said party should not be required to accept or pay for any more gas than was actually consumed.

At the time of the execution of this contract appellant had still only one well, but it proceeded thereafter with the further development and up to September, 1916, had brought in ten wells in the Kibler field. It had not contracted with any other person or corporation for the furnishing of gas, but it had obtained franchises from the incorporated towns of Alma, Conway and Clarksville to furnish gas to the inhabitants of those towns. It is not shown that appellant operated under these franchises, and they appear to have been subsequently abandoned. The Kibler field was situated northeast of the city of Van Buren, about twenty miles from Fort Smith, and the plants of appellees were, under their contracts, to be located, and were subsequently located at South Fort Smith, a suburb on the south side of the corporate limits of the city of Fort Smith. In order to transport the gas from the field to the location of these plants it was, of course, necessary to lay pipe lines, and appellant constructed a 10 inch line from the field through Van Buren to Fort Smith and [fol. 245] through that city to the suburb on the south where the manufacturing plants were located. Appellant obtained franchises

from the cities of Van Buren and Fort Smith on March 25, 1916, and April 3, 1916, respectively, to distribute and sell gas to the inhabitants of those cities.

The contract between appellant and appellee, Arkansas Zinc & Smeltering Corporation was executed on May 3, 1916, but it is shown that the negotiations were begun much earlier and resulted in a written memorandum concerning the terms of the contract as early as March 17, 1916, the formal contract being reduced to writing and signed by the parties on May 3, 1916. In this contract it is provided that the purchasing contractor should advance funds to appellant in the sum of $45,000.00, to be used in the construction of a pipe line, and that said purchaser should, subject to the prior contract with the Fort Smith Spelter Company, have the next call for gas produced by appellant and supplied through the pipe line, at the same price as that specified in the contract with the Spelter Company. Appellant entered into a similar contract with appellee Athletic Mining & Smeltering Company, dated November 8, 1916, subject to the prior contracts with the other appellees. Under these contracts the Fort Smith Spelter Company has been taking gas at the rate of 3,800,000 cubic feet per day; the Arkansas Zinc & Smeltering Corporation had been taking gas at the rate of from 1,250,000 to 1,500,000 cubic feet per day, and the Athletic Mining & Smeltering Company had been [fol. 246] taking gas at the rate of from 3,500,000 to 4,000,000 cubic feet per day. As the Kibler field became depleted, according to the proof, an adjoining field, only a few miles distant, known as the Williams field, was developed and appellant brought in its first well in January, 1919, and subsequently brought in other wells in that field, and has been furnishing gas to its customers from both fields. Appellant subsequently made contracts with nineteen other manufacturing plants at Fort Smith on the same terms as the contracts referred to herein, but the parties to those contracts have not intervened in these proceedings.

The testimony adduced by appellant tends to establish the fact that the rate specified in these contracts with the parties mentioned is not remunerative and the evidence is sufficient to support the finding of the Commission fixing the rate at approximately nine cents per thousand cubic feet for use by the manufacturing plants. The circuit court made no finding as to the reasonableness of the rate charged. Its ground for dismissing appellant's petition was necessarily based on the conclusion of that court that under the evidence these contracts were controlling and could not be abrogated by any regulations of the Corporation Commission.

If appellant was not a public utility at the time these contracts with appellees were entered into and the contracts were not entered into in anticipation of appellant becoming such a public utility, but [fol. 247] were merely private undertakings concerning a subject-matter over which the State had no control, then such contracts were valid and the obligations thereof could not be impaired by any State regulation. Neither could appellant impair the obligations of its own contract valid at the time of its execution by subsequently engaging in the operation of business subject to the State's control.

To permit that would be to allow the impairment of the contract by indirection, which could not be directly done. We are not aware of any authorities holding to the contrary on this proposition and we deem it unnecessary to cite any authorities in support of it.

It was within the charter rights of appellant to operate a business as a public utility in the production, transportation or sale of natural gas, but it was not limited to such operations, as a public utility and was not bound to so operate. It was authorized to do business in the production, transportation or sale of the commodities named, other than as a public utility. The question, therefore, is not merely whether appellant was authorized to operate as a public utility, but whether it elected to do so under the power thus conferred. It had a right to exercise those powers or not to do so, and in the event of its election not to do so, it could enter into private contracts not subject to public control or regulation. In other words appellant was not necessarily a public utility because its charter authorized it to become [fol. 248] one in the operation of its business, nor was it under its charter a public service corporation merely by the operation of a private business of the kind enumerated.

Section 1 of a statute of this State, enacted by the General Assembly of 1905, (Acts of 1905, page 577, Crawford & Moses Digest, section 3669), reads as follows:

"Pipe lines—right of way. Any corporation organized by virtue of the laws of this State, for the purpose of developing and producing mineral oil, or petroleum, or natural gas in this State, and marketing the same, or transporting or conveying the same by means of pipes from the point of production to any other point, either to refine or to market such oil, or to conduct such gas to any point or points to be used for heat or lights, may construct, operate and maintain a line or lines of pipes for that purpose along and under the public highways and the streets of cities and towns, with the consent of the authorities thereof, or across and under the waters and over any lands of the State and on the lands of individuals, and along, under, or parallel with the rights-of-way of railroads, and the turnpikes of this State; provided, that the ordinary use of such highways, turnpikes, and railroad rights-of-way be not obstructed thereby, or the navigation of any waters impeded, and that just compensation be paid to the owners of such lands, railroad rights-of-way, or turnpike, by reason of the occupation of such lands, railroad rights-of-way, or [fol. 249] turnpikes by the said pipe line or lines."

It will be observed that this statute does not declare that corporations organized for the purposes mentioned therein shall be public utilities. It does not undertake to classify them as such, but merely provides that corporations organized for those purposes may construct, operate and maintain a line or lines of pipes for that purpose along and under public highways, etc.," and may exercise the right of eminent domain for the purpose of condemning property to be used as a right-of-way. The purpose of the statute was merely to confer the right of eminent domain on a class of corporations when operating as public utilities which had not theretofore possessed such right.

The purpose of the Act, declared in the caption, is "to confer the right of eminent domain upon companies developing the mineral oil and natural gas resources of the State." It is not within the power of the law-makers to declare the operation of a business which is private in its nature to be public service and subject to public control. That was so decided by the Supreme Court of the United States in the case of Producers Transportation Co. v. R. R. Commission, 251 U. S. 228. In that case the court said: It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can consistently do [fol. 250] with the due process of law clause of the Fourteenth Amendment. * * * On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulations."

This was said in a case involving a statute of the State of California in many respects similar to our own statute quoted above, and the Supreme Court of California announced the same conclusion in regard to this statute as was later declared by the Supreme Court of the United States. (Producers Transportation Company v. Railroad Commission of California, 176 Cal. 499.) The California court in disposing of the matter in that case said: "Neither by the provision of the act in question nor the provision of the constitution can the State subject private property to a public use, nor confer authority upon the Railroad Commission to assume control of private pipe lines engaged in the transportation of crude oil. Neither by act of the legislature nor by declaration of the State constitution can private property be taken for public use without compensation therefor. * * * Where, however, the owner of property voluntarily devotes it to a public use, he in effect grants to the public an interest in such use, and to the extent of the interest so devoted to the public, the public may insist upon a voice in the control and regulation thereof." [fol. 251] The same principle was, in substance, announced by the Supreme Court of the United States in the case known as The Pipe Line Cases, 234 U. S. 548. In that case there was involved the interpretation of an Act of Congress extending the authority of the Inter-State Commerce Commission over persons and corporations "engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines," and the court decided that the Standard Oil Company was subject to that provision as a public carrier, notwithstanding the fact that it only transported oil which under its own requirements was to be sold to itself by the producer. The court decided, however, that

another corporation which only transported oil from one State to another through its own pipe lines from its own well to its own refinery was not a common carrier within the meaning of that statute.

Our conclusion is, therefore, that appellant did not become a public utility merely by force of the statute itself, without anything being done by appellant pursuant to the terms of that statute or in any other respect to make itself a public utility. But the conclusion is inevitable from the proper construction of the statute that if a corporation organized for the purposes of carrying on the business mentioned in the statute takes advantage of the terms of the statute it becomes a public utility subject to the State's control. The statute does not declare such corporations to be public utilities merely because they operate the business mentioned, but they cannot exercise the powers conferred under that statute without being public utili-
[fol. 252] ties. If a business so conducted is entirely private, it is not within the power of the legislature to confer upon it the power of eminent domain, as that is a power which can be exercised solely for the benefit of the public. Wyman on Public Service Corporations, Sec. 71; Ozark Coal Co. v. Pa. Anthracite Rd. Co. 97 Ark. 495. This was the effect given to the California statute by the Supreme Court of that State in the decision just referred to. That court upheld the decision of the Railroad Commission of the State in assuming jurisdiction of a corporation operating a pipe line because of the fact that the corporation had "availed itself of the right of eminent domain in condemning property for the right-of-way over which it constructed its pipe line." The court said: "To our minds this must be deemed conclusive evidence of a dedication of such property to public use, since it would not have exercised such right other than in 'behalf of a public use.' "

According to the evidence adduced before the Commission in the present case, appellant had not exercised the right of eminent domain under this statute for the purpose of obtaining a right-of-way for its pipe line, but the evidence is entirely convincing that it was making preparations to do so and these contracts on their face and especially in the light of the testimony adduced with respect to the attitude of the parties at that time necessarily contemplated the exercise of the right of eminent domain by appellant in equipping itself for the performance of the contract. The gas field was about twenty miles from the place where the gas was to be delivered to the
[fol. 253] parties under these contracts. The only available means of transportation was, of course, by pipe lines running from the field to the point of delivery and this pipe line necessarily would cross railroads and public highways and would cross the Arkansas River. Even if it be conceded that it was within the range of possibility to find some other means of transporting the gas from the field to the point of delivery without condemning a way over private property and without the granting of permits to use the public highways it certainly was not practicable or reasonable. Nor was it reasonable to expect that the parties had in contemplation some such extraordinary means of transportation. The only reasonable conclusion is that the

parties, when they contracted for delivery, meant that it was to be done by a pipe-line which was to be constructed in the exercise of the right of eminent domain over private property in case private grants could not be obtained, and over and along the public highways of the county. It is, therefore, certain that these contracts, though executed before appellant began operating as a public utility, were made in contemplation of such operations by appellant and were intended as preferential contracts extended to the appellees in priority of any rights of the public.

Shortly after the execution of the first contract and even before the other contracts were entered into appellant pursued its preparations for the construction of a pipe-line by the exercise of eminent domain under the statute and did in fact acquire a right of way under this power. And another significant fact is that it constructed a pipe-line [fol. 254] for service under these contracts which was of a size deemed necessary in order to serve the public as well and to furnish equipment for the transportation of all the gas from the field. The second contract specified the size of the pipe-line and while the first contract contained no such specification the proof shows that it was known at that time and understood that the pipe-line was to be of a size sufficient to serve all who might wish to obtain gas at the points of delivery along the pipe-line.

There are other facts in this case which indisputably stamp these contracts as being made in contemplation of the entrance of appellant upon the operation of a business which was public in its character and was intended as a preferential right against the public. In the first place it is a matter of general knowledge that natural gas is a commodity which is generally developed for the purpose of distribution to the public. It is not usually handled commercially as the subject-matter of private contracts. Appellees, in contracting with appellant were bound to know that the developments were for the purpose of sale of gas publicly to all consumers within the radius of appellant's business operations. They were bound to take notice of the fact that appellant had obtained a charter authorizing it to carry on business as a public utility. They knew, as recited in their contracts, that appellant had acquired leases for production of gas in a tremendous area of land and the contracts provided that appellant should acquire more leases and that the contract should cover any other leases thereafter obtained. In other words, the contracts were made in contemplation of very extensive operations by appellant, probably far in excess of the demands of each of these [fol. 255] contractual consumers and that necessarily meant that appellant would have to seek a market for the remainder of the gas produced and that the market would be at the points of delivery along its pipe-line, which was to be used as equipment for service under these contracts. The acquisition by appellant of franchises in several towns and cities, while not shown to be within the actual knowledge of appellees were matters of such common notoriety as appellees are presumed to have known of them. When these facts are considered in connection with the potent fact in the

case, that appellant was preparing at that time to exercise its power under the statute as a public service corporation, the conclusion is irresistible that these contracts were intended as preferential ones and all rights under them must yield to the superior right of the public to regulate such corporations, and the contracts constituted, in effect, an invasion of the public right, though not such in express terms. The Pipe Line Cases, 234 U. S. 548. It has been decided by this court that the State had the power, even under statutes enacted subsequent to the execution of contracts, to impose regulations which have the effect of changing the terms of contracts in regard to rates for public service. City of Camden v. Arkansas Light & Power Co. Ms. Op.

We have not overlooked the decision of the Supreme Court of California in the case of Allen v. Railroad Commission, 175 Pac. 466, cited and relied on so confidently by learned counsel for appellees. We do not, however, think that that case is at all controlling in the present case. There was no indication in that case of the [fol. 256] intention on the part of the court to impair the effect of the previous decision in the case we have cited. In that case there were private contracts intended as merely conferring private water rights to numerous parties and the only circumstance which tended to establish the corporation under consideration as a public utility was the fact that it had been furnishing water to a small town or village which consumed less than three per cent of the volume of water handled by the company. The court held that under the facts of that case there was no dedication of the bulk of the water handled to the public use. There was no element in that case, as was in the previous decision of that court cited, and in the present case, of the corporation having accepted the terms of a statute which necessarily made it a public service one.

Our conclusion is that the circuit court erred in dismissing the petition of appellant. The judgment is, therefore, reversed and the cause remanded for further proceedings.

Humphreys, J. concurs.

[fol. 257] IN THE SUPREME COURT OF ARKANSAS

FT. SMITH SPELTER COMPANY, Appellant,

vs.

CLEAR CREEK OIL & GAS COMPANY, Appellee

OPINION—Opinion delivered April 10, 1922

HUMPHREYS, J.: This case is before us a second time. On the first appeal the judgment of the trial court, dismissing the petition of the Clear Creek Oil & Gas Company, was reversed and remanded with directions to try the case upon the evidence adduced before the Arkansas Corporation Commission, and to determine therefrom whether the rates fixed by said Commission for the sale of natural

gas were reasonable. In remanding the cause this court used the following language, pertaining to the directions given to the trial court, to-wit: "The parties are entitled to a finding by the trial court on the issue as to the reasonableness of the rates fixed by the Commission, this is to say, a finding based on the evidence adduced before the Commission. The judgment is therefore reversed, and the cause remanded for further proceedings." The case on former appeal is reported in 148 Ark. at page 260, under the style of Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., and reference is made to the reported case for a full statement of the facts and issues involved therein.

Upon the remand of the cause the trial court was requested by appellants herein to ascertain whether the rates for the sale of gas fixed by the Corporation Commission were reasonable under the evidence presented to the Commission. The trial court refused the request. The request and refusal were in the form of declarations of law. Appellant's requested declaration of law, which was refused by the court, was as follows:

[fol. 258] "That, under the opinion of the Supreme Court on a former appeal, which was rendered April 18, 1921, and rehearing denied May 30, 1921, that this court has the right to make a finding and fix a rate at what this court thinks the evidence before the Corporation Commission justifies, and that this court is not required by the former decision of the Supreme Court in this case to find the rate as fixed by the Corporation Commission."

The court declared as a matter of law that he was bound to find the rates fixed by the Corporation Commission from the following statement appearing in the opinion of the court: "The evidence is sufficient to support the finding of the Commission fixing the rate at approximately 9 cents per thousand cubic feet for use by the manufacturing plants." The court thereupon approved and confirmed the rates fixed by the Corporation Commission, as follows: 15 cents per M cubic feet for the first 300,000 cubic feet; 13 cents per M cubic feet for the next 300,000 cubic feet; 10 cents per M cubic feet for the next 2,400,000 cubic feet; and 9 cents per M cubic feet for all gas used over 3,000,000 cubic feet, to be computed monthly. From the judgment thus approving and confirming the rates of the Corporation Commission an appeal has been duly prosecuted to this court.

Appellants insist upon a reversal of the judgment because it was rendered without a trial upon the record presented to the Corporation Commission. Appellee's insistence is that the appellants cannot be heard to complain because the declaration of law requested by appellants and refused by the court, as well as the declaration of law given by the court, were not brought into the record by a bill of exceptions. Also because a motion for new trial was not filed. A number of cases are cited by learned counsel for appellee holding that facts proved or admitted on the trial and declarations of law made by the court upon them must be brought into the record by a

bill of exceptions. Hall v. Bonville, 36 Ark. 491; Bradley v. Harkey, [fol. 259] 59 Ark. 178; Dunnington v. Frick Company, 60 Ark. 250. These cases have application where there has been a trial, but none where a trial had been refused or denied, as in the instant case. Declarations of law erroneously refused and given in the absence of a trial are necessarily in the same category as demurrers erroneously sustained or overruled by the court. Such errors appear on the face of the record, and consequently do not have to be brought into the record by a bill of exceptions. Following the same line of reasoning, a motion for new trial was unnecessary, as the court refused to try the case in accordance with the mandate. Until there had been a trial, a motion for a new trial could have no place. As it was unnecessary to file a motion for a new trial or to bring the declarations of law refused and given by the court into the record by a bill of exceptions in the instant case, in order to prosecute an appeal to this court, no useful purpose would be served by construing section 28 of act 571 of the Acts of the General Assembly of 1919, providing a remedy by appeal to the Supreme Court of Arkansas from the judgment of the circuit court.

The error of the trial court in denying appellants a trial upon the merits grew out of a misinterpretation of the following language used by the court in the opinion handed down on the former appeal of the case, to-wit: "The testimony adduced by appellant tends to establish the fact that the rates specified in these contracts with the parties mentioned is not remunerative, and the evidence is sufficient to support the finding of the Commission fixing the rate at approximately nine cents per thousand cubic feet for use by the manufacturing plants." In using the language quoted the court had reference to the legal sufficiency of the evidence to support the finding of the Commission, and had no reference whatever to the weight of the evidence. The cause was remanded for the court to determine the rea- [fol. 260] sonableness of the rates fixed by the Commission upon the weight of the evidence. The law of the case, as declared by this court on the former appeal, is that both parties, appellants and appellees, are entitled to a trial by the circuit court on the issue as to the reasonableness of the rates fixed by the Commission upon the evidence presented to the Commission. This can only be done by hearing the evidence and determining from the weight thereof whether the rates fixed by the Commission are reasonable. In other words, this court ruled on the former appeal that the rates fixed by the Commission did not bind the circuit court.

For the error indicated, the judgment is reversed and the cause remanded, with directions to the circuit court to determine from the weight of the evidence presented to the Corporation Commission whether the rates fixed by the Commission are reasonable.

[fol. 261] IN THE SUPREME COURT OF ARKANSAS, NOV. 5, 1923

No. 220.

CLEAR CREEK OIL & GAS CO.

v.

FORT SMITH SPELTER CO.

OPINION

HART, J.: This is the third appeal in this case. The opinions on the former appeals dealt with questions of law and of practice and reference is made to the opinions for the particular questions decided. Clear Creek Oil & Gas Co. v. Fort Smith Spelter Co. 148 Ark. 260, and Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co. 153 Ark. 170.

The present appeal is prosecuted to reverse a judgment of the circuit court overruling the rate established by the tribunal or commission which was vested with the power to establish rates.

The Legislature of 1921, abolished the Arkansas Corporation Commission, which had the power to regulate public service corporations and to establish rates therefor, and created the Arkansas Railroad Commission. General Acts of 1921, p. 177.

The rates involved in this appeal were established by the Arkansas Corporation Commission, which had jurisdiction to establish rates for pipe line companies for the transportation of oil, gas, or water. In the former appeal it was held that the Clear Creek Oil & Gas Co. was a public service corporation engaged in the transportation and sale of natural gas. It was, also, held that the Corporation Commission [fol. 262] in establishing the rates at which the gas should be transported and sold to customers acted in a quasi judicial capacity and that its orders establishing rates were subject to review by the court in the manner prescribed by statute. Clear Creek Oil & Gas Co. v. Fort Smith Spelter Co. 148 Ark. 260.

When the rates established by the Commission came on for hearing in the circuit court, the Arkansas Corporation Commission had been abolished and the present Railroad Commission created. The new act gave the Railroad Commission authority to establish rates for common carriers including pipe line companies for the transportation of oil, gas, or water. The act, also, provides for an appeal from the Railroad Commission to the Pulaski circuit court from any order made by the Railroad Commission.

Sec. 20 of the Act provides that when the appeal is taken, the Secretary of the Commission shall at once make a full and complete transcript of all proceedings had before such Commission in such matter and of all the evidence before it including all files therein and deposit the same forthwith in the office of the clerk of the circuit court. Continuing the section provides as follows:

"The said circuit court shall thereupon review said order upon the record presented as aforesaid in the case and enter its finding and order thereon and cause to be certified forthwith to such Commission the said order, therein directing that action be taken by said Commission in conformity therewith, unless an appeal from said order to the Supreme Court of this State shall be taken within [fol. 263] the time hereinafter specified and in case of such appeal to await further orders of said circuit court." General Acts of 1921, p. 177.

Thus it will be seen that the statute provides a fair opportunity for submitting the reasonableness of the rates established by the Commission to a judicial tribunal for determination upon its own independent judgment as to both the law and the facts and it cannot be said that the order in establishing the rates was void because it is in conflict with the 'due process' clause of the Constitution of the United States. Ohio Valley Water Co. v. Ben Avon Borough, et al. 253 U. S. 287.

This brings us to a discussion of what consideration the circuit court should have given to the finding of fact by the Commission. It will be noted that the statute does not fix any rule of evidence to govern the court in the premises.

In Louisville, etc., Railroad Co. v. Behlmer, 175 U. S. 648, Chief Justice White speaking for the court in a discussion of the weight to be given to the finding of the Interstate Commerce Commission, said:

"But the law attributes prima facie effect to the findings of fact made by the Commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising."

Again, in Illinois Central Railroad Company, Gulf and Ship Island Railroad Company, Sou. R. R. Co. v. Inter. Com. Com. 206 [fol. 264] U. S. 441, it was said that the findings of the Commission are made by law prima facie true and that the Supreme Court of the United States ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. In Darnell v. Edwards, et al., 244 U. S. 564, it was said that it is well established that in a question of rate-making there is a strong presumption in favor of the conclusion reached by an experienced administrative body after a full hearing.

In Railway Co. v. Smith, 60 Ark. 221, it was held that the courts can inquire into the reasonableness of passenger rates and that in such cases the presumption is that they are reasonable and that the burden is on those contesting them to affirmatively show that as to them they are not.

Therefore, the presumption is that the rates fixed by the Commission are reasonable and the burden of proof is upon the company contesting the rates to show to the contrary. Our statute contem-

plates a judicial review by the circuit court of the law and the facts as presented to the Commission and it is the duty of the circuit court to try the questions of law and fact upon the same record as the Commission, bearing in mind that the Commission is a rate-making body created by the Legislature, and its orders are prima facie correct, and that this presumption in their favor will yield only to the probative force of the evidence in the record. It is not the duty of the court to establish the rates, but to determine whether the rates as established by the Commission when considered in the light of the evidence are reasonable.

[fol. 265] Upon appeal to this court we are called upon to inquire into the weight of the evidence for the purpose of determining whether or not the judgment of the circuit court is against the preponderance of the evidence. In other words, on appeal the findings of fact by the circuit court are allowed to stand unless they are against the preponderance of the evidence when tested by the presumption in favor of the findings of the Commission as outlined above. Fort Smith Light & Traction Co. v. Bourland, 14 Sup. Ct. Rep. No. 8, p. 667.

In this connection it may be stated that neither the circuit court, nor this court sits as a board of revision to substitute our judgment for that of the Commission. Minnesota Rate Cases, 230 U. S. 352; 48 L. R. A. (n. s.) 1151.

This brings us directly to a consideration of whether the judgment of the circuit court overruling the finding of the Commission and establishing a new rate should be allowed to stand. No special finding of fact was made either by the Commission or by the circuit court. The testimony introduced by appellant was directed to showing what rates yielded a proper return upon the fair value of the property which was used in the service of the public in this case at the time it was so used. The accountants in making up their statements as to the fair value of the property took into consideration the testimony of experts as to the deterioration from year to year of the gas fields and the hazardous character of the business. No hard and fast rule in determining the value of the property can be laid down and each case must be determined to some extent by its own [fol. 266] peculiar facts, taking into consideration the nature of the business devoted to the service of the public and all the surrounding circumstances.

As a general rule the company is entitled to ask a fair return upon the value of the property which it employs for the public convenience. On the other hand the public is entitled to demand that no more be exacted from it than the services given by the public corporation are reasonably worth. Wilcox v. Consolidated Gas Co. 212 U. S. 19, and Darnell v. Edwards, 244 U. S. 564.

The Commission made a sliding scale of rates; the higher rates being made for small consumers and the lower ones for factories and other large consumers like the Fort Smith Spelter Co.

No useful purpose could be served by making a detailed statement of the evidence in the case. The life and extent of gas fields are very uncertain. What promises a fine field one year may fail

the next. New fields may be discovered from time to time in the same locality. This element of uncertainty would make it unprofitable for us to set out a statement of facts so that it might be used as a precedent in another case. If the Commission or the circuit court had made a finding of facts upon which their respective conclusions were reached this would have been of great advantage to us in testing the correctness thereof.

In the absence of a special finding on the part of the Commission or of the circuit court, we will presume that each acted within its appropriate sphere as outlined above or at least we have considered [fol. 267] the matter from that viewpoint in weighing the evidence and reaching our conclusion in the matter.

As above stated the Clear Creek Oil & Gas Co. introduced evidence before the Commission tending to show the fair value of its property, the probable length of time its fields could be profitably worked and all the surrounding circumstances which could be considered in estimating the fair value of its property and the reasonable value of its service. An attack was made on its testimony by the Fort Smith Spelter Co. and evidence was introduced by it before the Commission tending to show that the evidence of appellant did not correctly establish the value of the property of the public utility in question.

When we have considered all the evidence in the record, bearing in mind the deference as indicated above, which should be given to the decision of the Commission, we are of the opinion that the circuit court erred in finding that the rates established by the Commission were unreasonable and in establishing a lower rate.

The evidence for appellee was too general and not sufficiently definite and certain to overcome the presumption in favor of the finding of the Commission and to show that the rates established by it was unreasonable.

The finding of the circuit court in this regard is not supported by the preponderance of the evidence and its judgment based upon such finding must therefore be reversed. In this connection it may [fol. 268] be stated that the establishment of rates is the making of a rule for the future and is therefore, an act legislative in character whether exercised by the Legislature itself or by some subordinate body created for that purpose by it.

Therefore, the power of the Commission to establish or change rates is continuous and upon application of either party showing a material change in the conditions from those existing at the time the rates were established, will be ground for new action in the premises by the Commission. The result of our views is that the judgment of the circuit court will be reversed and the cause remanded with directions to it to certify forthwith to the Arkansas Railroad Commission an order directing that it put into effect the rates established in this case by the Arkansas Corporation Commission until the further action of the Arkansas Railroad Commission in the premises upon a new application as indicated above.

It is so ordered.

[fol. 269] No. 7139. Fort Smith Spelter Co. et al. v. Clear Creek Oil & Gas Co. Pulaski. Guy Fulk, J. $11.50. Transcript filed Nov. 28, 1921. W. P. Sadler, Clk., by J. H. Campbell, D. C. Appellant's Briefs due Jany. 7, 1922. Appellees' Briefs due Feby. 6, 1922. Reply Briefs due Feby. 13, 1922. Subject to call Feby. 13, 1922.

[fol. 270] Pleas Before Hon. Guy Fulk, Judge of the Pulaski Circuit Court, Second Division, had on the 3rd Day of October, 1921.

In the Case of

#14076

Clear Creek Oil & Gas Company

vs.

Fort Smith Spelter Company et al.

Hearing on the Suit After Remanded from the Supreme Court

Judgment for Plaintiff

Pulaski Circuit Court, Second Division, March Term, 1921, Friday, June 3, 1921

14076

Clear Creek Oil & Gas Co., Plaintiff,

vs.

Fort Smith Spelter Co. et al., Defendants

On this day is filed, by leave of the Court, a mandate from the Supreme Court of Arkansas in the above entitled cause, which mandate is in words and figures as follows, to-wit:

"State of Arkansas, sct:

In the Supreme Court

Mandate

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House in the City of Little Rock, on the 22nd day, being the fourth Monday of November, A. D. 1920, amongst others were the following proceedings, on the 18th day of April, A. D. 1921, a day of said term:

CLEAR CREEK OIL & GAS CO., Appellant,

vs.

FORT SMITH SPELTER CO. ET AL., Appellee.

Appeal from Pulaski Circuit Court, Second Division

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, Second Division, and was argued by counsel; on consideration whereof, it is the opinion of [fol. 271] the Court that there is error in the proceedings and judgment of said Circuit Court in this cause, in this:

The Court erred in dismissing the appellant's petition.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered, be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said Circuit Court for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

It is further considered that said appellants recover of said appellees all their costs in this Court in this cause expended, and have execution thereof.

Wood, J. & Humphreys, J., concur.

In testimony that the above is a true copy of the decree of said Supreme Court rendered in the case therein stated, I, W. P. Sadler, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 3rd day of June, 1921.

W. P. Sadler, Clerk, by J. H. Campbell, D. C." (Seal.)

(Tr., 1-2.)

[fol. 272] IN THE PULASKI CIRCUIT COURT

CLEAR CREEK OIL & GAS COMPANY, Plaintiff,

vs.

FORT SMITH SPELTER COMPANY ET AL., Defendants

DECLARATION OF LAW REQUESTED BY DEFENDANTS—Filed October 3, 1921

The defendants requested the Court to find as matter of law, that under the opinion of the Supreme Court on a former appeal which was rendered April 18, 1921, and rehearing denied May 30, 1921, that this Court has the right to make a finding and fix a rate at what this Court thinks the evidence before the Corporation Commission justifies, and that this Court is not required by the former decision of the Supreme Court in this case, to find the rate as fixed by the Corporation Commission.

The Court refused to declare the law as above requested, but declared as matter of law that the following statement in the opinion "the evidence is sufficient to support the finding of the Commission fixing the rate at approximately 9¢ per thousand cubic feet for use by the manufacturing plants" was binding on the Circuit Court, and as a matter of law he was bound to find the rate fixed by the Commission.

Each of the defendants objected to the Court's declining to give the declaration of law requested by defendants and their objections were overruled and each of them, at the time and in proper manner, saved its separate exceptions.

Each of the defendants objected to the declaration of law made by the Court and the Court overruled each objection and each defendant, at the time, separately and in proper manner saved its exceptions, and each of the defendants prayed an appeal to the Supreme Court, which was granted.

[File endorsement omitted.]

[fol. 273] PULASKI CIRCUIT COURT, SECOND DIVISION, SEPTEMBER TERM, 1921, MONDAY, OCTOBER 3, 1921

14076

CLEAR CREEK OIL & GAS COMPANY, Plaintiff,

vs.

FORT SMITH SPELTER COMPANY and ARKANSAS ZINC & SMELTING CORPORATION, Defendants

JUDGMENT

This cause having heretofore been heard on the mandate of the Supreme Court and on the record transferred to this Court from the Corporation Commission for review, the plaintiff having appeared by its atorneys, Hill & Fitzhugh, and the defendants having appeared by their attorneys, T. M. Mehaffy, and Daily & Woods, and the Court having taken it under advisement and having duly considered the same, doth find:

That the rates fixed by the Corporation Commission are in all things approved and confirmed, which said rates are as follows, to-wit:

15 cents per M cubic feet for the first 300,000 cubic feet.
13 cents per M cubic feet for the next 300,000 cubic feet.
10 cents per M cubic feet for the next 2,400,000 cubic feet.
and 9 cents per M cubic feet for all gas used over 3,000,000 cubic feet; to be computed monthly.

It is, therefore, considered, ordered and adjudged that the said rates promulgated by the Corporation Commission by its order effective July 1, 1920, be and are hereby adjudged to be in full force and effect on and after said date.

It is further ordered, considered and adjudged that the order of this Court made on August 18, 1920, directing the plaintiff to supply gas to the defendants at and for the price of 4 cents per M cubic feet on condition that the defendant, Fort Smith Spelter Company, give a good and sufficient bond in the sum of Fifteen Thousand Dollars ($15,000.00) and that the Arkansas Zinc & Smelting Corporation in the sum of Six Thousand Dollars ($6,000.00), conditioned that the Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation shall well and truly pay to the Clear Creek Oil & Gas Company, the plaintiff herein, for gas furnished and used by them, any and all sums awarded by the Court in excess of 4 cents and that on the giving and approval of said bonds that the [fol. 274] said rates promulgated by the Corporation Commission be suspended until the final hearing is and is hereby declared to be of no further force and effect.

It being hereby adjudged that this is the final hearing contemplated by said order of August 18, 1920.

It is further considered, ordered and adjudged that the plaintiff, Clear Creek Oil & Gas Company, have and recover from the Fort Smith Spelter Company and Arkansas Zinc & Smelting Corporation all of its costs herein laid out and expended.

To each and every finding of the Court and to the judgment in each part thereof the defendants at the time excepted.

The defendants each prayed an appeal to the Supreme Court, which is granted (Tr., 5-7).

[fol. 275] PULASKI CIRCUIT COURT, SECOND DIVISION, SEPTEMBER TERM, 1921, MONDAY, OCTOBER 10, 1921

14076

CLEAR CREEK OIL & GAS COMPANY, Plaintiff

vs.

ATHLETIC MINING & SMELTING COMPANY, Defendant

JUDGMENT

This cause having heretofore been heard on the mandate of the Supreme Court and on the record transferred to this Court from the Corporation Commission for review, the plaintiff having appeared by its attorneys, Hill & Fitzhugh, and the defendant having appeared by its attorney, James B. McDonough, and the Court having taken it under advisement and having duly considered the same, doth find:

That the evidence sustains the finding of the Corporation Commission and that the rates fixed by the Corporation Commission applicable to the defendant are reasonable and just rates and they are in all things approved and confirmed, which said rates are as follows, to-wit:

15 cents per M cubic feet for the first 300,000 feet,
13 cents per M cubic feet for the next 300,000 feet,
10 cents per M cubic — for the next 2,400,000 cubic feet and
9 cents per M cubic feet for all gas used over 3,000,000 cubic feet; to be computed monthly.

It is therefore considered, ordered and adjudged that the said rates promulgated by the Corporation Commission by its order effective July 1, 1920, be and are hereby adjudged to be in full force and effect on and after said date.

It is further ordered, considered, and adjudged that the order of this Court made on August 18, 1920, directing the plaintiff to supply gas to the defendant at and for the price of 4 cents per M cubic feet on condition that the defendant give a good and sufficient bond in the sum of one thousand dollars ($1,000.00), conditioned that the Athletic Mining & Smelting Company shall well and truly pay to the Clear Creek Oil & Gas Company, the plaintiff herein, for gas [fol. 276] furnished and used by it, any, and all sums awarded by the Court in excess of 4 cents and that on the giving and approval of said bond that the said rates promulgated by the Corporation Commission be suspended until final hearing is and is hereby declared to be of no further force and effect.

It is further considered, ordered and adjudged by the Court that the said Athletic Mining & Smelting Company and sureties upon its bond given in compliance with the orders of this Court are adjudged liable for the difference between said promulgated rates and the 4 cents which this Court ordered to supply to said defendant and that the plaintiff may bring action therefor in this Court or any other Court that it may be advised has jurisdiction.

It being hereby adjudged that this is the final hearing contemplated by said order of August 18, 1920.

It is further considered, ordered and adjudged that the plaintiff, Clear Creek Oil & Gas Company, have and recover from the Athletic Mining & Smelting Company all its costs herein laid out and expended.

To each and every finding of the Court and to the judgment in each part thereof the defendant at the time excepted (Tr., 8-10).

[fol. 277] PULASKI CIRCUIT COURT, SECOND DIVISION, SEPTEMBER TERM, 1921. THURSDAY, NOVEMBER 3, 1921

14076

CLEAR CREEK OIL & GAS COMPANY, Plaintiff,

vs.

FORT SMITH SPELTER COMPANY et al., Defendants

Come defendants by their attorneys, Mehaffy, Donham & Mehaffy, and Daily & Woods, and by leave of the Court file herein their motion and prayer for appeal (Tr., 11).

[fol. 278] IN THE PULASKI CIRCUIT COURT

[Title omitted]

MOTION AND PRAYER FOR APPEAL—Filed November 3, 1921

Comes the Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation and move the Court, in writing, as required by statute, to grant them an appeal to the Supreme Court, and state that the judgment against them is contrary to the law and contrary to the evidence, and that this Court erred in holding that it could not go into the facts to determine what, in the judgment of this Court, would be a fair rate to be charged, and that under the opinion of the Supreme Court on a former appeal, which was rendered April 18, 1921, and rehearing denied May 30, 1921, this Court did not have the right to make a finding and fix a rate at what this Court thinks the evidence before the Corporation Commission justified, and erred in holding that this Court is required by the former decision of the Supreme Court in this case, to find the rate as fixed by the Corporation Commission.

That this Court erred in declaring, as a matter of law, that the statement in the former opinion of this case, "the evidence is sufficient to support the finding of the Commission fixing the rate at approximately 9¢ per thousand feet for use by the manufacturing plants," was binding on the Circuit Court, and holding as a matter of law that this Court was bound to find the rate fixed by the Commission.

This Court erred in holding that the contracts heretofore made for gas at 4¢ was not binding.

This Court erred in holding that the Clear Creek Oil & Gas Company was a public utility, or public service corporation, and that the contracts were, therefore, not binding.

The Court erred in holding that the Corporation Commission had any authority or right to set aside the contracts and fix a rate different from the rate mentioned in the contracts.

The Court erred in holding that a corporation organized for the purpose of carrying on the business mentioned in the statute, takes [fol. 279] advantage of the terms of the statute; that it becomes a public utility and subject to the State's control. The Court held that the Clear Creek Oil & Gas Company was making preparations to take advantage of the statute and thereby become a public utility and that the contracts show on their face in the light of the testimony adduced and the attitude of the parties, that at the time they necessarily contemplated the exercise of the right of eminent domain, and the Court erred in holding that the contracts were made in contemplation of such operation by appellant and were intended as preferential contracts.

Wherefore, the Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation pray an appeal to the Supreme Court.
Mehaffy, Donham & Mehaffy, Daily & Woods, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 280] PULASKI CIRCUIT COURT, SECOND DIVISION, SEPTEMBER TERM, 1921, THURSDAY, NOVEMBER 8, 1921

14076

[Title omitted]

ORDER ALLOWING APPEAL

On this day the motion of defendants, Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation, for an appeal herein, now coming on to be heard, same is submitted to the Court, and the Court, being well and sufficiently advised, doth grant said motion, and doth grant said defendants an appeal to the Supreme Court of Arkansas (Tr., 15).

[fol. 281] STATE OF ARKANSAS,
County of Pulaski, ss:

CLERK'S CERTIFICATE

I, Lillian Chrisp, Clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the foregoing transcript contains a true, correct and perfect copy of all the pleadings and record entries in the case of Clear Creek Oil & Gas Company vs. Fort Smith Spelter Company, et al., #14076, since the filing of the Mandate from the Supreme Court on June 3, 1921, as the same appear of file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed hereto the seal of said Court, this the 12th day of November, 1921.

Lillian Chrisp, Circuit Clerk, by John M. Shackleford, D. C.

(Seal.)

Fee bill omitted.

[fol. 282] No. 7853. Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Company. Cross Appeals. Pulaski, 2nd Div. Richard M. Mann, J. $11.50. Transcript filed January 30, 1923. W. P. Sadler, Clerk, by C. R. Stevenson, D. C. Appellant's brfs. due 3-11-23. Appellees' brfs. due 4-10-23. Appellant's reply due 4-17-23. Subject to call 4-23-23.

[fol. 283] In the Supreme Court of Arkansas

[Title omitted]

Stipulation Dismissing Appeal of Arkansas Zinc and Smelting Co.

All matters in dispute between the Clear Creek Oil & Gas Company and the Arkansas Zinc & Smelting Corporation have been settled. It is therefore stipulated by and between the Clear Creek Oil & Gas Company and the Arkansas Zinc & Smelting Corporation that the appeal of the Arkansas Zinc & Smelting Corporation in this cause shall be dismissed, and that the appeal of the Clear Creek Oil & Gas Company so far as it affects the Arkansas Zinc & Smelting Corporation shall be dismissed, leaving unaffected the appeals of the Clear Creek Oil & Gas Company and the Fort Smith Spelter Company so far as the judgment affects their respective rights.

(Signed) Daily & Woods, Attorneys for Arkansas Zinc and Smelting Corporation. (Signed) Hill & Fitzhugh, Attorneys for Clear Creek Oil & Gas Company.

[fol. 284] [Title omitted]

[fol. 285] Pulaski Circuit Court, Second Division, March Term, 1922, Wednesday, July 19, 1922

14076

[Title omitted]

On this day, by leave of the Court, is filed a mandate from the Supreme Court of Arkansas herein, which mandate is in words and figures, to-wit:

"STATE OF ARKANSAS, sct:

IN THE SUPREME COURT

MANDATE

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House in the City of Little Rock, on the 27th day, being the fourth Monday of November, A. D. 1921, amongst others were the following proceedings, on the 10th day of April, A. D. 1922, a day of said term:

7139

FORT SMITH SPELTER COMPANY ET AL., Appellant,

vs.

CLEAR CREEK OIL & GAS COMPANY ET AL., Appellee.

Appeal from Pulaski Circuit Court, Second Division

This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, Second Division, and was argued by counsel; on consideration whereof it is the opinion of the Court that there is error in the proceedings and judgment of said Circuit Court in this cause, in this:

The Court erred in its declaration of the law, whereby the appellants were denied a trial upon the merits.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered, be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said Circuit Court with directions to determine from the weight of the evidence presented to the Corporation Commission, whether the rates fixed by that Commission are reasonable, and for further proceedings not inconsistent with the opinion herein delivered.

[fol. 286] It is therefore considered that said appellants recover of said appellees all their costs in this Court expended, and have execution thereof.

In testimony that the above is a true copy of the decree of said Supreme Court, rendered in the case therein state, I, W. P. Sadler, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the City of Little Rock, this 17 day of July, A. D. 1922.

W. P. Sadler, Clerk, by C. R. Stevenson, D. C. (Seal.)

(Tr., 1-2.)

[fol. 287] PULASKI CIRCUIT COURT, SECOND DIVISION, SEPTEMBER TERM, 1922, FRIDAY, JANUARY 5, 1923

14076

[Title omitted]

DECLARATIONS OF LAW REFUSED

This cause came on for hearing on the 11th day of November, 1922, and the plaintiff, Clear Creek Oil and Gas Company appeared by Hill & Fitzhugh, and the Fort Smith Spelter Company appeared by its attorneys, Daily & Woods and Mehaffy, Donham & Mehaffy, and all parties announced ready for trial.

Thereupon after hearing the reading of a portion of the evidence taken before the Arkansas Corporation Commission in this case, and having heard the argument of counsel, the Court took the matter under advisement in order to read all of the evidence taken before the Corporation Commission and to consider the declarations of law hereinafter set out, and requested by each of the defendants.

And now on this 5th day of January, 1923, the Court having read all of the evidence taken before the Corporation Commission and the Court being well and sufficiently advised in the premises, doth refuse each of the following declarations of law requested by the defendant, Arkansas Zinc & Smelting Corporation.

Declarations of Law Requested by the Defendant Arkansas Zinc & Smelting Corporation

1

The Court finds that the order of the Corporation Commission impairs the obligation of the contract between the Clear Creek Oil & Gas Company and the Arkansas Zinc & Smelting Corporation, and is therefore violative of and contrary to Article One, Section Ten, of the Constitution of the United States.

[fol. 288]

2

The Court finds from the evidence that there is a purely private existing contract between the Clear Creek Oil & Gas Company and the Arkansas Zinc & Smelting Corporation; that same was entered into at a time when the undisputed evidence shows that the Clear Creek Oil & Gas Company was not a public Service Corporation in any sense of the word, and the Court further finds that the order of the Corporation Commission impairs the obligation of that contract, and is therefore violative of and contrary to Article One, Section Ten, of the Constitution of the United States.

3

The Court finds that the decision and order of the Corporation Commission deprived the Arkansas Zinc & Smelting Corporation of its property without due process of law, and is therefore violative of and contrary to Section One, of Article 14, of the Constitution of the United States.

To which action of the Court in refusing each of said declarations of law requested by it the Arkansas Zinc & Smelting Corporation, at the time, saved its separate and several exceptions.

And the Court doth refuse each of the following declarations of law requested by the Fort Smith Spelter Company:

Declarations of Law Requested by the Defendant Fort Smith Spelter Company

1

The Court finds that the order of the Corporation Commission impairs the obligation of the Contract between the Clear Creek Oil & Gas Company and the Fort Smith Spelter Company, and is therefore violative of and contrary to Article One, Section Ten, of the Constitution of the United States.

2

The Court finds from the evidence that there is a purely private existing contract between the Clear Creek Oil & Gas Company and the Fort Smith Spelter Company; that same was entered into at a time when the undisputed evidence showed that the Clear Creek Oil [fol. 289] & Gas Company was not a public service corporation in any sense of the word, and the court further finds that the order of the Corporation Commission impairs the obligation of that contract, and is therefore violative of and contrary to Article One, Section Ten, of the Constitution of the United States.

3

The court finds that the decision and order of the Corporation Commission deprived the Fort Smith Spelter Company of its property without due process of law, and is therefore violative of and contrary to Section One, of Article 14, of the Constitution of the United States.

To which action of the Court in refusing each of said declarations of law requested by it, the Fort Smith Spelter Company, at the time, saved its separate and several exceptions.

The Court doth further find that the order of the Arkansas Corporation Commission fixing the rate for gas is unreasonable and contrary to the law and evidence.

And the Court doth further find that the Arkansas Corporation Commission's order fixing the rate to be paid by the smelter companies as follows:

First 300,000 cubic feet, 15¢ per thousand,
Next 300,000 cubic feet, 13½¢ per thousand,
Next 2,400,000 cubic feet, 10¢ per thousand,
All over 3,000,000 cubic feet, 9¢ per thousand,

is unreasonable and unlawful and contrary to the law and the evidence, to each of which findings the Clear Creek Oil & Gas Company, at the time saved its separate and several exceptions.

And the Court finds from the evidence taken before the Corporation Commission that a rate of 7¢ per thousand cubic feet be paid by the Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation, is just, fair and reasonable, and a rate of 7¢ is therefore fixed, to be paid by the smelting companies, to which finding the Clear Creek Oil & Gas Company, the Fort Smith Spelter Company and the Arkansas Zinc & Smelting Corporation, and each of them, at the time saved their separate and several exceptions.

It is, therefore, considered, ordered and adjudged by the court that the rate to be paid by the defendant companies shall be 7¢ per [fol. 290] thousand cubic feet, instead of the rate fixed by the order of the Corporation Commission, to which judgment of the Court, the plaintiff and each of the defendants, at the time, saved their separate and several exceptions.

And the Clear Creek Oil & Gas Company, having on the same day filed its motion for a new trial, and the Fort Smith Spelter Company, having on the same day filed its motion for new trial, and the Arkansas Zinc & Smelting Corporation, having on the same day filed its motion for new trial, each of said motions for new trial are hereby overruled. To which action of the Court the plaintiff, Clear Creek Oil & Gas Company, and the defendants, Fort Smith Spelter Company and Arkansas Zinc & Smelting Corporation, and each of them at the time respectively saved their separate and several exceptions.

And the plaintiff and each of the defendants pray an appeal to the Supreme Court, each of which appeals are hereby granted (Tr., 3-8).

[fol. 291] PULASKI CIRCUIT COURT

[Title omitted]

MOTION FOR A NEW TRIAL—Filed January 5, 1923

Comes the Clear Creek Oil & Gas Company, the plaintiff herein, and moves the Court for a new trial for the following reasons, to-wit:

First. Because the Court erred in finding that the rates fixed by the Corporation Commission are unreasonable, unlawful and contrary to the law and evidence.

Second. The Court erred in not finding that the preponderance of the evidence sustained the rates established by the Corporation Commission as reasonable and just.

Third. Because the Court erred in fixing a rate of 7¢ per thousand cubic feet, whereas the great preponderance of the evidence shows that said rate would not be reasonably compensatory to the plaintiff.

Hill & Fitzhugh, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 292] IN THE PULASKI CIRCUIT COURT

[Title omitted]

MOTION FOR NEW TRIAL—Filed January 5, 1923

Comes the Fort Smith Spelter Company, one of the defendants herein and moves the Court for a new trial, for the following reasons, to-wit:

1. Because the Court erred in refusing to give the following declaration of law requested by said defendant:

"The court finds that the order of the Corporation Commission impairs the obligation of the contract between the Clear Creek Oil & Gas Company and the Fort Smith Spelter Company, and is therefore violative of and contrary to Article One, Section Ten, of the Constitution of the United States.

2. Because the Court erred in refusing to give the following declaration of law requested by said defendant:

The court finds from the evidence that there is a purely private existing contract between the Clear Creek Oil & Gas Company and the Fort Smith Spelter Company; that same was entered into at a time when the undisputed evidence showed that the Clear Creek Oil & Gas Company was not a Public Service Corporation in any sense of the word, and the Court further finds that the order of the Corporation Commission impairs the obligation of that contract, and is therefore violative of and contrary to Article One, Section Ten, of the Constitution of the United States.

3. Because the court erred in refusing to give the following declaration of law requested by said defendant:

The court finds that the decision and order of the Corporation Commission deprived the Fort Smith Spelter Company of its property without due process of law, and is therefore violative of and contrary to Section One, of Article 14, of the Constitution of the United States.

[fol. 293] 4. Because the court erred in fixing any rate other than the contract rate of 4¢.

5. Because the order and judgment of the court is contrary to the law and impairs the obligation of the contract between the Clear Creek Oil & Gas Company and this defendant, and is therefore violative of and contrary to Article One, Section Ten of the Constitution of the United States.

6. Because the decision, order and judgment of the Court deprives the defendant, Fort Smith Spelter Company, of its property without due process of law, and is therefore, violative of and contrary to Section One, of Article 14 of the Constitution of the United States.

7. Because the court erred in fixing a rate of 7¢ per thousand cubic feet, whereas the great preponderance of the evidence shows that said rate is unreasonable and unlawful and contrary to the law and the evidence.

8. Because under the evidence the court erred in fixing any rate higher than 4¢ per thousand cubic feet.

Mehaffy, Donham & Mehaffy, Daily & Woods, Attorneys for Fort Smith Spelter Company.

[File endorsement omitted.]

[fol. 294] IN THE PULASKI CIRCUIT COURT

[Title omitted]

MOTION FOR A NEW TRIAL—Filed January 5, 1923

Comes the Arkansas Zinc & Smelting Corporation, one of the defendants herein and moves the Court for a new trial, for the following reasons, to-wit:

1. Because the court erred in refusing to give the following declaration of law requested by said defendant:

The court finds that the order of the Corporation Commission impairs the obligation of the contract between the Clear Creek Oil & Gas Company and the Arkansas Zinc & Smelting Corporation, and is therefore violative of and contrary to Article One, Section Ten of the Constitution of the United States.

2. Because the court erred in refusing to give the following declaration of law requested by said defendant:

The courts finds from the evidence that there is a purely private existing contract between the Clear Creek Oil & Gas Company and the Arkansas Zinc & Smelting Corporation; that same was entered into at a time when the undisputed evidence shows that the Clear Creek Oil & Gas Company was not a public service corporation in any

sense of the word, and the court further finds that the order of the Corporation Commission impairs the obligation of that contract, and is therefore violative of and contrary to Article One, Section Ten, of the Constitution of the United States.

3. Because the court erred in refusing to give the following declaration of law requested by said defendant:

The court finds that the decision and order of the Corporation Commission deprived the Arkansas Zinc & Smelting Corporation of its property without due process of law, and is therefore violative of and contrary to Section One, of Article 14 of the Constitution of the [fol. 295] United States.

4. Because the court erred in fixing any rate other than the contract rate of 4¢.

5. Because the order and judgment of the court is contrary to the law and impairs the obligation of the contract between the Clear Creek Oil & Gas Company and this defendant, and is therefore violative of and contrary to Article One, Section Ten of the Constitution of the United States.

6. Because the decision, order and judgment of the court deprives the defendant, Arkansas Zinc & Smelting Corporation, of its property without due process of law, and is, therefore, violative of and contrary to Section One, of Article 14 of the Constitution of the United States.

7. Because the court erred in fixing a rate of 7¢ per thousand cubic feet, whereas the great preponderance of the evidence shows that said rate is unreasonable and unlawful and contrary to the law and the evidence.

Because under the evidence the court erred in fixing any rate higher than 4¢ per thousand cubic feet.

Mehaffy, Donham & Mehaffy, Daily & Woods, Attorneys for Arkansas Zinc & Smelting Corporation.

[File endorsement omitted.]

[fol 296] STATE OF ARKANSAS,
County of Pulaski, ss:

CLERK'S CERTIFICATE

I, O. L. McNair, Clerk of the Circuit Court within and for the County aforesaid, do hereby certify that the foregoing transcript contains a true, correct and perfect copy of all of the pleadings and record entries in the case of Clear Creek Oil & Gas Company v. Fort Smith Spelter Company and Arkansas Zinc & Smelting Corporation, #14076, as the same appear of file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed hereto the seal of said court this 24th day of January, 1923.

O. L. McNair, Circuit Clerk, by V. S. O'Neal, D. C. (Seal.)

Fee bill omitted.

[fol. 297] STATE OF ARKANSAS:

IN THE SUPREME COURT

Be it Remembered That at a term of the Supreme Court of the State of Arkansas begun and held at the Court House in the City of Little Rock, on the 22nd day, being the fourth Monday of November, A. D. 1920, the following proceedings were had, viz:

February 28, 1921

[Title omitted]

On motion and on request of parties the following causes are set down by the Court for oral argument on March 28th, prox., viz:

* * * * * * *

6654. Clear Creek Oil & Gas Company v. Fort Smith Spelter Company, et al.

March 28, 1921

The following causes being regularly called, come the parties thereto by their attorneys and solicitors, and said causes are submitted upon the transcripts of the records and the briefs filed, and are by the Court severally taken under advisement, viz:

* * * * * * *

6654. Clear Creek Oil & Gas Company v. Ft. Smith Spelter Company, et al. Argued orally.

[fol. 298] IN SUPREME COURT OF ARKANSAS

April 18th, 1921

6654

CLEAR CREEK OIL & GAS COMPANY, Appellant,

v.

FORT SMITH SPELTER COMPANY et al., Appellee

Appeal from Pulaski Circuit Court, Second Division

JUDGMENT

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, Second Division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is error in the proceedings and judgment of said circuit court in this cause, in this: The court erred in dismissing the appellants' petition.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled, and set aside with costs, and that this cause be remanded to said circuit court for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

It is further considered that said appellants recover of said appellees all their costs in this court in this cause expended, and have execution thereof.

Humphreys, J. and Wood, J. concur.

[fol. 299] May 2, 1921

(Caption omitted)

The appellees having filed a petition for rehearing within the time allowed by law, and duly served the same, now prays for time in which to prepare and file a supporting brief, and said appellant is allowed by the Court two weeks in which to file such brief.

May 16, 1921

Petitions for rehearing having been filed within the time allowed by law in the following causes and duly served, the said petitions are submitted with the responses and briefs, and are by the Court severally taken under advisement, viz:

* * * * * * *

6654. Clear Creek Oil & Gas Company v. Fort Smith Spelter Company, et al.

May 30, 1921

ORDER OVERRULING PETITIONS FOR REHEARING

Being fully advised, the petitions for rehearing filed in the following causes are by the Court severally overruled, viz:

* * * * * * *

6654. Clear Creek Oil & Gas Company v. Fort Smith Smelter Company, et al.

[fol. 300] Be it remembered, That at a term of the Supreme Court of the State of Arkansas begun and held at the Court House in the City of Little Rock, on the 28th day, being the fourth Monday of November, A. D. 1921, the following proceedings were had, viz:

7139

FORT SMITH SPELTER COMPANY et al., Appellants,

vs.

CLEAR CREEK OIL & GAS COMPANY et al., Appellees

April 3, 1922

The following causes being regularly called, come the parties thereto by their attorneys and solicitors, and said causes are submitted upon the transcripts of the records and the briefs filed, and are by the Court severally taken under advisement, viz.:

* * * * * * *

7139

[Title omitted]

IN THE SUPREME COURT OF ARKANSAS

April 10th, 1922

7139

FORT SMITH SPELTER COMPANY et al., Appellants,

vs.

CLEAR CREEK OIL & GAS COMPANY et al., Appellees.

Appeal from Pulaski Circuit Court, Second Division

JUDGMENT

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, Second Division, and was

argued by counsel, on consideration whereof it is the opinion of the Court that there is error in the proceedings and judgment of said [fol. 301] circuit Court in this cause, in this: The court erred in its declaration of the law, whereby the appellants were denied a trial upon the merits.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said circuit court with directions to determine from the weight of the evidence presented to the Corporation Commission, whether the rates fixed by that Commission are reasonable, and for further proceedings not inconsistent with the opinion herein delivered.

It is further considered that said appellants recover of said appellees all their costs in this Court in this cause expended, and have execution thereof.

[fol. 302] STATE OF ARKANSAS:

IN THE SUPREME COURT

Be It Remembered, That at a term of the Supreme Court of the State of Arkansas begun and held at the Court House, in the City of Little Rock, on the 27th day, being the fourth Monday of November, A. D. 1922, the following proceedings were had, viz:

7853

CLEAR CREEK OIL & GAS COMPANY, Appellant,

vs.

FORT SMITH SPELTER COMPANY and ARKANSAS ZINC & SMELTING COMPANY, Appellees.

Cross-appeals from Pulaski Circuit Court, Second Division

ORDER DISMISSING APPEAL OF ARKANSAS ZINC & SMELTER CO.

On this day, and by leave of Court, is noted of record stipulation of counsel to the effect that the appeal of the Arkansas Zinc & Smelting Company be dismissed, and that the appeal of the Clear Creek Oil & Gas Company, in so far as it affects the said Arkansas Zinc & Smelting Company, be dismissed, leaving unaffected the appeals of the Clear Creek Oil & Gas Company and Fort Smith Spelter Company.

And now comes the said Fort Smith Spelter Company by its attorneys and prays a cross-appeal, which is by the Court granted.

185

October 15, 1923

(Caption omitted)

On request of the appellant for leave to argue this case orally, the same is now by the Court set down for such argument on October 29th inst.

[fol. 303] October 29, 1923

The following causes being regularly called, come the parties thereto by their attorneys and solicitors, and said causes are by the Court severally taken under advisement, viz:

* * * * * * *

7853

Clear Creek Oil & Gas Company v. Fort Smith Spelter Company; argued orally.

In Supreme Court of Arkansas

November 5, 1923

7853

Clear Creek Oil & Gas Company, Appellant,

vs.

Fort Smith Spelter Company, Appellee

Appeal from Pulaski Circuit Court, Second Division

Judgment

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, Second Division, and was argued by counsel, on consideration thereof it is the opinion of the Court that there is error in the proceedings and judgment of said circuit court in this cause, in this: The Court erred in finding that the rates established by the Arkansas Corporation Commission were unreasonable, and in establishing a lower rate.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, for the errors aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said circuit court with directions to certify forthwith to the Arkansas Railroad Commission an order [fol. 304] directing it to put into effect, the rates established by the Arkansas Corporation Commission, effective until the further action of the Railroad Commission upon the filing of a new application for

a change of rates showing a material change in the conditions from those existing at the time the rates aforesaid were established.

It is further considered that said appellant recover of said appellee all its costs in this court in this cause expended, and have execution thereof.

November 19, 1923

(Caption omitted)

The appellee having filed a petition for rehearing within the time allowed by law, now prays for time in which to file a supporting brief; and said appellee is allowed by the Court two weeks from date in which to file said brief; and the appellant files a response to said petition.

STATE OF ARKANSAS:

IN THE SUPREME COURT

Be it Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House in the City of Little Rock, on the 26th day, being the fourth Monday, of November, A. D. 1923, the following proceedings were had, viz:

December 3, 1923

The petitions for rehearing filed in the following causes being called, they are now submitted with the briefs and responses, and [fol. 305] are by the Court severally taken under advisement, viz:

* * * * * * *

7853. Clear Creek Oil & Gas Company v. Fort Smith Spelter Company.

December 10, 1923

ORDER OVERRULING PETITIONS FOR REHEARING

Being fully advised, the petitions for rehearing filed in the following causes, are by the Court severally overruled, viz:

* * * * * * *

7853. Clear Creek Oil & Gas Company v. Fort Smith Spelter Company.

[fol. 306] STATE OF ARKANSAS:

IN THE SUPREME COURT

CLERK'S CERTIFICATE

I, W. P. Sadler, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings called for by the stipulation of counsel in the case of Fort Smith Spelter Company, Plaintiff v. Clear Creek Oil & Gas Company, Defendant, and also of the three opinions and record of proceedings had and done in this Court, in the three appeals of this case, as the same now appear on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 22 day of January, 1924.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of the Supreme Court, Arkansas.)

[fol. 307] IN THE SUPREME COURT OF ARKANSAS

No. 6654

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes the Fort Smith Spelter Co. plaintiff in error and says that in the record aforesaid there is manifest error and it, therefor, states that the errors therein which it intends to rely on at the hearing are as follows to wit:

1. The Supreme Court of Arkansas erred in holding and deciding that the Clear Creek Oil & Gas Co. was a public service corporation or contemplated becoming such when the contracts were made with the Fort Smith Spelter Co.

2. The Supreme Court of Arkansas erred in holding and deciding that the order of the corporation commission of the State of Arkansas does not impair the obligations of the private contracts between the Fort Smith Spelter Co. and Clear Creek Oil & Gas Co., and that said order is valid.

3. The Supreme Court of Arkansas erred in holding and deciding that the contracts between the Fort Smith Spelter Co. and Clear Creek Oil & Gas Co. are void, this decision of the Supreme Court of Arkansas being violative of and contrary to Article 1, Section X, of the Constitution of the United States.

4. The Supreme Court of Arkansas erred in holding and deciding that the order of the corporation commission which destroyed the

contractual property rights of the Fort Smith Spelter Co. in violation of Art. XIV, Section I of the Constitution of the United States was a valid order.

5. The Supreme Court of Arkansas erred in holding and deciding that the contracts on their face and in the light of testimony, contemplated the exercise of eminent domain by Clear Creek Oil & Gas Co.

6. The Supreme Court of Arkansas erred in holding and deciding [fol. 308] that the Clear Creek Oil & Gas Co. had a right to have the contracts set aside in its suit where the public was not a party and was not concerned.

7. The Supreme Court of Arkansas erred in holding and deciding that the contracts were not valid.

Jas. S. Holtand, Mehaffy, Donham & Mehaffy, Attorneys for Ft. Smith Spelter Co.

[fol. 309] IN THE SUPREME COURT OF ARKANSAS

No. 6654

[Title omitted]

PRAYER FOR REVERSAL

Inasmuch as *as* the Supreme Court committed error in its judgment and decision herein, as set forth as in assignment of errors, herein filed, plaintiff in error prays that the Supreme Court of the United States reverse said judgment.

Jas. S. Holtand, Mehaffy, Donham & Mehaffy, Attorneys for Plaintiff in Error.

[fol. 310] IN THE SUPREME COURT OF ARKANSAS

No. 6654

[Title omitted]

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR

To the Honorable Willis Vandevanter, Circuit Justice:

Your petitioner, Fort Smith Spelter Co. respectfully representes that on the fifth day of November, 1923, a final judgment and decision was made and entered by this court in the above entitled cause, then pending on appeal herein.

That the said Supreme Court of the State of Arkansas is the highest

court of said state of Arkansas in which a decision in this suit and matter could be had.

That thereafter within the time allowed by law and by leave of this court, your petitioner filed a petition for re-hearing upon said judgment and decision, and that said motion was on the 10th day of December, 1923 overruled, leaving the judgment and decision in full force and effect. That in this action, your petitioner drew in question the validity of the act of the Legislature of the State of Arkansas, creating the Arkansas Corporation Commission approved April 1st, 1919 and drew in question the validity of the order of the Arkansas Corporation Commission in declaring invalid the contracts entered into between the Clear Creek Oil & Gas Co. and the Fort Smith Spelter Co. on the ground of it being repugnant to the Constitution of the United States and the decision of this court was in favor of the validity of the order of the Arkansas Corporation Commission setting aside and holding invalid said contract and in said action, your petitioner drew in question the validity of the order of said Arkansas Corporation Commission in holding that the Clear Creek Oil & Gas Co. was a public service corporation at the time contract was entered into and on the ground that it was repugnant to the [fol. 311] Constitution of the United States and the decision of this court was in favor of its validity.

Your petitioner considering itself aggrieved by the decision and judgment of this court above referred to, prays a writ of error herefrom to the Supreme Court of the United States and an order fixing bond without supersedeas. It tenders herewith its assignment of errors.

Tom M. Mehaffy and Jas S. Holt, Attorneys for Fort Smith Spelter Company.

January 7, 1924.

Writ of error allowed and amount of boxed fixed at $500,00, but not to operate as a supersedeas.

Willis Van Devanter, Associate Justice.

[fol. 312] Bond on Writ of Error for $500—Approved: Van Devanter, J., and filed January 10, 1924; omitted in printing

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[fol. 313] United States of America, ss:

Writ of Error—Filed January 10, 1924

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before

you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Clear Creek Oil & Gas Company and Fort Smith Spelter Company, No. 6654, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to [fol. 314] the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Fort Smith Spelter Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 8th day of January, in the year of our Lord one thousand nine hundred and twenty-four.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

Allowed by Willis Van Devanter, Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

[fol. 315] STATE OF ARKANSAS:

IN THE SUPREME COURT

CERTIFICATE OF LODGMENT

I, W. P. Sadler, Clerk of said Court, do hereby certify that there was lodged with me as such clerk on January 10, 1924, in the matter of Fort Smith Spelter Company v. Clear Creek Oil & Gas Company,

1. The original bond of which a copy is herein set forth.

2. The writ of error and a copy, as herein set forth.

3. The Assignment of Errors, with a prayer for Reversal, and a copy, as herein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Little Rock, Arkansas, this 22d day of January, 1924.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of Supreme Court of Arkansas.)

[fol. 316] CITATION—In usual form, showing service on Hill & Fitzhugh; filed January 10, 1924; omitted in printing

[File endorsement omitted.]

[fol. 317] UNITED STATES OF AMERICA:

SUPREME COURT OF ARKANSAS

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the proceedings and record called for by the stipulation of counsel filed herein and attached hereto, in the case of Fort Smith Spelter Company v. Clear Creek Oil & Gas Company.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this 22 day of January, 1924.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of the Supreme Court of Arkansas.)

Costs of suit omitted.

Endorsed on cover: File No. 30,084. Arkansas Supreme Court. Term No. 774. Fort Smith Spelter Company, plaintiff in error, vs. Clear Creek Oil & Gas Company. Filed January 26, 1924. File No. 30,084.

Office Supreme Court, U. S.
FILED
FEB 19 1924
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. [redacted]266

FORT SMITH SPELTER COMPANY, PETITIONER,

vs.

CLEAR CREEK OIL AND GAS COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

TOM M. MEHAFFY,
JAMES W. MEHAFFY,
W. R. DONHAM,
J. S. HOLT,
Counsel for Petitioner.

(30,084)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 774.

FORT SMITH SPELTER COMPANY, PETITIONER,

vs.

CLEAR CREEK OIL AND GAS COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

To the Honorable Supreme Court of the United States:

Comes the Fort Smith Spelter Company and in support of its application for a writ of certiorari, to be directed to the Supreme Court of the State of Arkansas, respectfully says: On March 17, 1916, D. W. Kerr and H. S. Buck entered into a written contract with the Clear Creek Oil and Gas Company, respondent herein, under the terms of which respondent agreed to furnish gas to them, to be used in a smelting plant, at the rate of four (4¢) cents per thousand cubic

feet. This contract was afterwards assigned to your petitioner herein, the Fort Smith Spelter Company.

On May 13, 1920, respondent, the Clear Creek Oil and Gas Company, filed its petition before the then Arkansas Corporation Commission, the first paragraph of which is as follows:

"BEFORE THE CORPORATION COMMISSION.

CLEAR CREEK OIL & GAS COMPANY, *Petitioner,*

vs.

FT. SMITH SPELTER COMPANY, ARKANSAS ZINC & SMELTING CORPORATION, ATHLETIC MINING & SMELTING COMPANY, *Respondents.*

Petition to Establish and Enforce a Rate on Natural Gas for Smelters.

Comes the Clear Creek Oil & Gas Company and invokes the authority of the Commission under Section 8 of the Act of April 1, 1919, being Act number 571, to modify the existing gas rates fixed by private contract between the petitioner and respondents and to establish a reasonable rate for the sale of petitioner's natural gas to the respondents and all other smelters in lieu of the existing rates, which the petitioner alleges are unjust, unreasonable, insufficient and inadequate, and for cause thereof the petitioner alleges: * * *"

and asked that the rate be fixed at ten (10¢) cents. In substance, it asked the Corporation Commission to modify the existing rate of four (4¢) cents fixed in said private written contract between petitioner and respondent and raise the rate to ten (10¢) cents.

In apt time your petitioner filed its response to said petition before said Corporation Commission, setting up, among other things, that the respondent herein, the Clear Creek Oil and Gas Company, was not a public utility at the time said contract was entered into; that said contract was purely private in its nature; that it was not subject to control by said Corporation Commission; that any law or order of said Corporation Commission passed subsequent to the date said contract was entered into fixing the rate of gas at other than the contract price would impair the obligations and terms of the contract entered into between the gas company and the smelter company, and therefore would be violative of Section 10, Article I, of the Constitution of the United States, and would also deprive your petitioner herein of its property without due process of law, contrary to Section 1, Article 14, of the Constitution of the United States.

There was a hearing before the Corporation Commission, the result of which was that the petition of the respondent herein for regulation of rates was allowed by the said Corporation Commission, and the rate fixed at approximately nine (9¢) cents per thousand cubic feet.

Your petitioner then appealed to the Circuit Court of Pulaski County, as provided in the act creating the Corporation Commission and regulating its proceedings, and said court, upon a hearing, made a general finding against respondent, the Clear Creek Oil and Gas Company, and held the contract valid and binding and dismissed the petition; thereupon the respondent appealed to the Arkansas Supreme Court and that Court reversed the Circuit Court and held the contract invalid. The case was again tried before the Pulaski County Circuit Court, again appealed and reversed with di-

rections to the Circuit Court to ascertain what was a reasonable rate, and the Circuit Court thereupon fixed a rate of seven cents (7¢), from which both parties, in due time, appealed again to the Arkansas Supreme Court, and on November 5, 1923, the case was reversed and remanded with directions to the Circuit Court of Pulaski County to certify forthwith to the Arkansas Railroad Commission (an agency of the State of Arkansas created since the beginning of this litigation to take the place of the Arkansas Corporation Commission) an order directing that it put into effect the rates theretofore established by the Arkansas Corporation Commission; that your petitioner thereupon filed its petition for rehearing before the Supreme Court of Arkansas, which said petition was, on December 10, 1923, denied, leaving said judgment and decision in full force and effect at the present time, and that the said judgment is final.

The Chief Justice of the Supreme Court of Arkansas thereafter denied the petition of your petitioner for a writ of error, whereupon application was duly made for said writ to Mr. Justice Van Devanter, of this court, and same was allowed by him on the — day of ——, 19—, for the purpose of reviewing said judgment. Said writ has been duly issued, served, the record filed in this court, and citation waived. Your petitioner alleges that throughout every stage of this action from the filing of its response to the petition of the Clear Creek Oil and Gas Company for modification and reduction of the rate for gas set up in the original contract on the — day of ——, 19—, before the Arkansas Corporation Commission down to the final decision of the Supreme Court of the State of Arkansas, on December 10, 1923, that it has appropriately and persistently urged and claimed its rights,

privileges, and immunities under the Constitution of the United States, and more particularly throughout the entire litigation, has pleaded specially as a defense its rights under Section 10, Article I, and Section 1, Article 14, of the Constitution of the United States.

Your petitioner alleges further that said rights, privileges, and immunities claimed by it as aforesaid under the Constitution of the United States have been denied it by the final decision of the Supreme Court of Arkansas, and that said court is the highest court in said State to which an appeal can be taken.

Your petitioner shows that the writ of error heretofore granted by Mr. Justice Van Devanter, of the court, is entitled "Fort Smith Spelter Company, plaintiff in error, *vs.* Clear Creek Oil & Gas Company, defendant in error," and is numbered — in the files of the clerk of the Supreme Court of the United States, and that the record in that case is identical with the record in this case, and in compliance with the rules of this court your petitioner furnishes and herewith attaches as Exhibit "A" to this petition a duly certified copy of the entire transcript of the record in this case, including the proceedings of the court to which the writ of error is asked to be directed.

Your petitioner respectfully contends that the Supreme Court of Arkansas erred in holding that respondent, Clear Creek Oil and Gas Company, was a public utility at the time the contract in question was entered into; that said contract was subject to the control of the Arkansas Railroad Commission, and that the action of said Railroad Commission in changing the rate for gas set out in the private written contract between the parties hereto was a valid exercise of said

Commission's powers and did not violate any right, privilege, or immunity enjoyed by your petitioner under the Constitution of the United States.

Wherefore your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this court, directed to the Supreme Court of Arkansas, to command said court to certify and send to this court, on a date certain to be therein designated, a full and complete transcript of the record of the proceedings of said Supreme Court in said case, therein entitled "Clear Creek Oil and Gas Company, appellant, *vs.* Fort Smith Spelter Company, appellee," and numbered *7853* in said Supreme Court, to the end that said cause may be reviewed and determined by this court, as provided by the provisions of an act of Congress known as the Judicial Code and by the amendments thereto, including that of September 6, 1916, and that your petitioner may have other and further relief in the premises as to this court may seem proper and in conformity with said act of Congress, and that the judgment of said Supreme Court of Arkansas in said cause, and every part thereof, may be reversed by this honorable court.

TOM M. MEHAFFY,
JAS. W. MEHAFFY,
W. R. DONHAM,
J. S. HOLT,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 774.

FORT SMITH SPELTER COMPANY, *Petitioner,*

vs.

CLEAR CREEK OIL & GAS COMPANY, *Respondent.*

To Jos. M. Hill, H. L. Fitzhugh, Attorneys for Respondent:

You are hereby notified that the petitioner herein in the above-styled cause will, on Monday, March 3, 1924, present its petition for certiorari to this court.

Given under our hands this the 16th day of February, 1924.

The undersigned hereby acknowledges receipt of a copy of the above and foregoing notice and acknowledges receipt of a copy of the petition for writ of certiorari therein referred to.

Given under our hands this the 16th day of February, 1924.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Clear Creek Oil & Gas Company.

[Endorsed:] File No. 30,084. Supreme Court U. S., October Term, 1923. Term No. 774. Fort Smith Spelter Company, petitioner, *vs.* Clear Creek Oil & Gas Co. Petition for a writ of certiorari and proof of service. Filed Feb. 19, 1924.

FILED
MAY 26 1924
WM. R. STANSBURY
CLERK

No. [redacted]266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

FORT SMITH SPELTER COMPANY,
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY,
DEFENDANT IN ERROR.

RESPONSE TO MOTION TO DISMISS WRIT OF ERROR

JAS. SEABORN HOLT,
JAMES W. MEHAFFY and
TOM M. MEHAFFY,
Attorneys for Plaintiff in Error.

[redacted] PRINTING CO., FT. SMITH, ARK.

No. 111

Supreme Court of the United States

OCTOBER TERM 1962

No. 774

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

FORT SMITH SPELTER COMPANY,
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY,
DEFENDANT IN ERROR

INDEX

	Page
RESPONSE TO MOTION	2
STATEMENT AND ARGUMENT	3

CITATIONS

	Page
Clear Creek Oil & Gas Co. vs. Fort Smith Spelter Co. et al., 274 Fed. 906	6
Clear Creek Oil & Gas Co. vs. Fort Smith Spelter Co., 148 Ark. 260	7
Ga. Ry. & Power Co. vs. Decatur, decided by this Court, June 4, 1923	9
New Orleans Water Works vs. La. Sugar Ref. Co., 125 U. S. 18	9
Bryan vs. Board of Education, 151 U. S., p. 639	9
McGahey vs. Virginia, 135 U. S. 662	9
Delmar vs. Merchants Mutual Ins. Co., 14 Wall. 661	9
J. J. Douglas vs. Commonwealth of Ky., 168 U. S. 448	9
Creswell vs. Knights of Pythias, 225 U. S. 261	9
Frank vs. Magnum, 237 U. S. 347	9
K. C. S. Ry. Co. vs. Albers Com. Co., 223 U. S. 591	10
United States et al. vs. Ohio Oil Co., 234 U. S. 546	11
Terminal Taxicab Co. vs. Chas. W. Kutz, 241 U. S. 252	12
Ark. Nat. Gas Co. vs. Ark. Railroad Commission, U. S. Adv. Sheets, April 16, 1923, p. 421, Decided March 19, 1923	14

No. 774

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

FORT SMITH SPELTER COMPANY,
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY,
DEFENDANT IN ERROR

RESPONSE TO MOTION TO DISMISS WRIT OF ERROR

The real question here is whether the contract between the Fort Smith Spelter Company, plaintiff in error, and the Clear Creek Oil & Gas Company, defendant in error, is a valid contract; if it is a valid contract, then that its obligation has been impaired is undisputed. This is not a question of fact, as the defendant in error contends. The facts are not in dispute. The assignment of errors raises the questions that the order of the Commission and the decision of the Court impaired the obligation of the private contract between the Fort Smith Spelter Company and the Clear Creek Oil & Gas Company and violated the Constitution of the United States.

The Supreme Court of Arkansas, while stating in effect that there was no conflict in the testimony and that the Clear Creek Oil & Gas Company had a right to exercise the powers which make it a public utility, or not to do so, and in event of its election not to do so, it could enter into a private contract not subject to public control or regulation.

That it was not necessarily a public utility because its charter authorized it to become one in the operation of its business, nor was it under its charter a public service corporation because of the kind of business enumerated.

The undisputed proof in this case shows that the Clear Creek Oil & Gas Company was not a public utility at the

time the contracts were made, and the questions presented here are therefore not questions of fact, but questions of law.

STATEMENT AND ARGUMENT

From July 25, 1914, the time the defendant in error was organized as a corporation, up to the time this contract in controversy was made, March 17, 1916, the Clear Creek Oil & Gas Company had no pipe line and had contracted for none (R. 48). At that time it had no market for its gas. Its first well had been brought in in November, 1915 (R. 51). Buck and Kerr, with whom the contract in controversy was made, were at Clinton, Oklahoma, and the representative of the Clear Creek Oil & Gas Company telephoned them from Fort Smith and went to Muskogee, Okla., and Kerr went back with them and entered into the contract for the 4-cent gas. They would not have located at Fort Smith or built a smelter there but for the fact that they got a contract for gas at 4 cents (R. 89).

It should be remembered that at the time the Clear Creek Oil & Gas Company induced the parties to come back to Fort Smith and enter into the contract, that the Clear Creek Oil & Gas Company had one well but no market for their gas, and that the first gas it sold or contracted to sell was the contract of the Fort Smith Spelter Company. Neither party at the time had any idea that the contract was invalid, nor did the Clear Creek Oil & Gas Company at that time anticipate serving the public. They had to depend upon contracts like the one made, for a market for their gas, because both Fort Smith and Van Buren were being served by other concerns at the time and before this contract was made. This contract was made on the 17th day of March, 1916, and both parties regarded the contract as valid and binding until the Clear Creek Oil & Gas Company learned that it could sell its gas for a higher price. It then undertook to get the parties with whom it had contracted, to pay a higher price for gas, and when it failed to get an agreement abrogating the contract and get a higher price, on the 17th day of March, 1920, it filed its petition with the Arkansas Corporation Commission, three years after the contract had been entered into (R. 3). It did, however, in the meantime claim that it had entered into a new agreement with the

Fort Smith Spelter Company, by which it was to receive a greater price for its gas, and brought suit in the State Chancery Court at Fort Smith, Arkansas, to compel specific performance of the contract which it claimed had been made. This suit was by the Fort Smith Spelter Company removed to the United States District Court at Fort Smith and decided in favor of the Fort Smith Spelter Company, and an appeal was taken by the Clear Creek Oil & Gas Company, and the decision of the District Court was by the Court of Appeals affirmed. Up to that time there was no contention that the contracts were invalid because the defendant in error was a public service corporation, but it then contended that it had made a new contract.

An examination of the record in this case and the decisions of the Courts in suits between these parties will conclusively show that at the time the contract was entered into neither party thought that the Clear Creek Oil & Gas Company was a public utility or that it had any intention of ever becoming such. It owned 25,000 or 30,000 acres of leases and had one gas well producing about twelve million feet per day, but it had no market for its gas, no sale for it, because both Fort Smith and Van Buren were at the time being supplied with gas by other gas producers. So that the Clear Creek Oil & Gas Company was under the necessity of finding purchasers for its gas, and its representative went to Oklahoma and induced the persons who made this contract to return to Fort Smith and enter into the contract. The Fort Smith Spelter Company, after entering into the contract, built a smelter at a cost of more than $300,000, relying on the contract and the good faith of the Clear Creek Oil & Gas Company. As soon as its smelter was completed began to take gas from the Clear Creek Oil & Gas Company and this continued until the supply of gas in and around Fort Smith became insufficient, or it was thought that it was about to become insufficient, to supply the demands. The Clear Creek Oil & Gas Company then concluded that because of that, it might get a higher price for its gas and immediately began negotiations with persons with whom it had contracts, seeking to get them to pay a higher price for gas. The Fort Smith Spelter Company declined to modify its contracts as to the rate, but insisted on its right to receive gas according to the terms of the contract. The Clear

Creek Oil & Gas Company did not dispute that the Fort Smith Spelter Company had this right, but contended that they would have to get more territory and extend their field; that they did not have the money with which to do this, and they gave these things as reasons why the price should be changed. They did not at that time contend that they were a public utility, nor did they contend that the contract was not binding.

On the contrary, they cut off some of the persons they had been supplying with gas and with whom they had contracts, in order to be able to furnish the smelters with the gas required by them. The record shows that the Fort Smith Spelter Company had the first call on gas, and each subsequent contract recognized the right of the prior contracts to first call on gas. The Clear Creek Oil & Gas Company, therefore, had the right, and exercised the right, to cut off some of the concerns that they had contracts with in order to supply those that had prior call with what gas they needed. When this was done, some suits were brought against the Clear Creek Oil & Gas Company, and others, including the Fort Smith Spelter Company, undertaking to restrain the Clear Creek Oil & Gas Company from cutting off their gas. The Fort Smith Spelter Company answered and pleaded its contract and its rights under it, and the Clear Creek Oil & Gas Company then wanted to make some sort of a compromise of the suit or suits, claiming that it could supply the gas we needed by a contract that it could get with one Cazort, but that they would have to pay six cents for gas and wanted us to increase our price to them.

The Fort Smith Spelter Company agreed to make a compromise on certain conditions, but stated at the time that it would not modify its contract in any way except upon the conditions that it named. The suits were then all dismissed with prejudice, and the Clear Creek Oil & Gas Company continued to furnish the Fort Smith Spelter Company with gas at the same price for some months, and then filed a suit in the State Chancery Court at Fort Smith, alleging that at the time the suits were dismissed an agreement or compromise had been reached and that the old contract or the contract that is now in controversy had been modified as to the price of gas. The Fort Smith Spelter Company filed petition

and bond to remove to the United States District Court at Fort Smith, the case was removed, and the Fort Smith Spelter Company then filed its answer, alleging the contract that is now in controversy and alleging that it did not agree to modify or change the price except upon certain conditions that had not been complied with. After testimony was taken, the case in the Federal Court was transferred to the law docket, testimony was taken there, at the close of which the District Judge directed the jury to find for the defendant, Fort Smith Spelter Company.

Thereafter, an appeal was taken to the Circuit Court of Appeals by the Clear Creek Oil & Gas Company, and the case was decided on June 9, 1921, affirming the decision of the District Court holding that the contract to modify the rate had not been entered into and was not binding.

> Clear Creek Oil & Gas Co. vs. Fort Smith Spelter Co. et al., 274 Fed. 906.

The Clear Creek Oil & Gas Company had never suggested that it was a public utility until after the suit was decided against it in the District Court at Fort Smith. It then, on the 17th day of March, 1920, three years after the contract had been made, filed its application before the Arkansas Corporation Commission, alleging for the first time that it was a public utility and that the rates were confiscatory, and asking that reasonable rates be fixed (R. p. 3).

The Supreme Court of Arkansas, in construing the statute and charter of the Clear Creek Oil & Gas Company, among other things, said:

> "It was within the charter rights of appellant to operate a business as a public utility in the production, transportation, or sale of natural gas, but it was not limited to such operations as a public utility and was not bound to so operate. It was authorized to do business in the production, transportation, or sale of the commodities named other than as a public utility. The question, therefore, is not merely whether appellant is authorized to operate as a public utility, but whether it elected to do so under the power thus conferred. It had a right to exercise those powers, or not to do so, and in the event of its election not to do so, it could enter

into private contracts not subject to public control or regulation. In other words, appellant was not necessarily a public utility because its charter authorized it to become one in the operation of its business; nor was it under its charter a public service corporation merely by the operation of private business of the kind enumerated."

Clear Creek Oil & Gas Co. vs. Fort Smith Spelter Co., 148 Ark. 260.

The record discloses, as we have already said, that the Clear Creek Oil & Gas Company elected to operate, and did operate, as a private corporation, and not a public utility, for three years after this contract was made, and this is the thing the Supreme Court says it had a right to do.

The defendant in error claims that there is nothing but a question of fact raised by the assignment of errors in this case. The Assignment of Errors is as follows:

"IN THE SUPREME COURT OF ARKANSAS

"No. 6654

"(Title Omitted)

"ASSIGNMENT OF ERRORS

"And now comes the Fort Smith Spelter Co., plaintiff in error, and says that in the record aforesaid there is manifest error and it, therefore, states that the errors therein which it intends to rely on at the hearing are as follows, to-wit:

"1. The Supreme Court of Arkansas erred in holding and deciding that the Clear Creek Oil & Gas Company was a public service corporation or contemplated becoming such when the contracts were made with the Fort Smith Spelter Company.

"2. The Supreme Court of Arkansas erred in holding and deciding that the order of the Corporation Commission of the State of Arkansas does not impair the obligations of the private contracts between the Fort Smith Spelter Co. and Clear Creek Oil & Gas Co., and that said order is valid.

"3. The Supreme Court of Arkansas erred in holding and deciding that the contracts between the Fort Smith Spelter Co. and Clear Creek Oil & Gas Co. are void, this decision of the Supreme Court of Arkansas being violative of and contrary to Article I, Section X, of the Constitution of the United States.

"4. The Supreme Court of Arkansas erred in holding and deciding that the order of the Corporation Commission which destroyed the contractual property rights of the Fort Smith Spelter Company in violation of Art. XIV, Section I, of the Constitution of the United States, was a valid order.

"5. The Supreme Court of Arkansas erred in holding and deciding that the contracts on their face and in the light of testimony, contemplated the exercise of eminent domain by Clear Creek Oil & Gas Co.

"6. The Supreme Court of Arkansas erred in holding and deciding (fol. 308) that the Clear Creek Oil & Gas Co. had a right to have the contracts set aside in its suit where the public was not a party and was not concerned.

"7. The Supreme Court of Arkansas erred in holding and deciding that the contracts were not valid.

"JAS. S. HOLT and
"MEHAFFY, DONHAM & MEHAFFY,
"Attorneys for Fort Smith Spelter Co."

(R. pp. 188, 189.)

These questions in the assignment of errors have all been insisted upon from the beginning of the case before the Arkansas Corporation Commission, and continued throughout the trial in the Circuit Court and the Supreme Court of Arkansas, the Fort Smith Spelter Company always contending that its contracts were valid and binding, and the Clear Creek Oil & Gas Company making no contention that it was a public utility for three years.

In this connection we call the Court's attention to the fact that this Court will always determine for itself whether a valid contract has been made, and, if so, whether its obligation has been impaired.

"On the other hand, in deciding the constitutional

question presented, this Court will determine for itself whether there is in fact a contract and, if so, the extent of its binding obligations."

Ga. Ry. & Power Co. vs. Decatur, decided by this Court June 4, 1923;

New Orleans Water Works vs. La. Sugar Ref. Co., 125 U. S. 18;

Bryan vs. Board of Education, 151 U. S. 639;

McGahey vs. Virginia, 135 U. S. 662;

Delmar vs. Merchants Mutual Ins. Co., 14 Wall. 661;

J. J. Douglas vs. Commonwealth of Ky., 168 U. S. 448.

"While it is true that upon a writ of error to a State Court we do not review findings of fact, nevertheless, two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

Creswell vs. Knights of Pythias, 225 U. S. 261.

"When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal Court must examine the facts."

Frank vs. Magnum, 237 U. S. 347.

The above is found in the dissenting opinion, but it is a statement of the rule that has been many times aproved by this Court.

"While it is true that upon a writ of error to a State Court we cannot review its decision upon pure question

of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

K. C. S. Ry. Co. vs. Albers Com. Co., 223 U. S. 591.

"The finding necessarily involves the decision of questions of law bearing upon the Federal right, such as the legal effect of evidence."

Id. p. 595.

"The uncontradicted testimony of witnesses likely to be informed on the subject disclosed the existence of an applicable lawful rate. True, this testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded.

"Such being the state of the evidence, the necessary conclusion, as a matter of law, is that an applicable and lawfully established local rate was in force on each road."

Id. p. 595.

In the present case, we have the parties entering into a contract, operating under it for three years, no intention on the part of the Clear Creek Oil & Gas Company to serve the public; therefore, no expectation on its part of becoming a public utility--and yet the only reason which the Arkansas Supreme Court gives for the statement that it anticipated or expected to become a public utility, was the presumption that it intended to do so because it was going to lay a pipe line, and the Court assumed, without any evidence on which to base the assumption, that it would have to act as a public utility in order to condemn a right-of-way.

The entire pipe line might have been built without the exercise of the right of eminent domain, or without the Clear Creek Oil & Gas Company becoming a public utility. The pipe line cases, decided by this Court, show that some three hundred miles of pipe line were constructed under private

arrangement, without the exercise of the right of eminent domain. In the present case we have only twenty miles of pipe line. In the pipe line cases three hundred miles were constructed on the right-of-way of the Atchison, Topeka & Santa Fe Railway Company under agreement with that company and without exercising the power of eminent domain.

United States et al vs. Ohio Oil Co., 234 U. S. 546.

We respectfully submit that if the Court was going to pass on the validity of contracts on presumption, it would have been fairer to presume that the pipe line could have been constructed by private agreement over the lands and by private agreement with the St. Louis, San Francisco Railroad Company on its bridge across the Arkansas river at Van Buren.

It should be held in mind that while the Supreme Court of Arkansas says that the evidence is entirely convincing that the Clear Creek Oil & Gas Company was making preparations to exercise the right of eminent domain, and that the contracts on their face, and especially in the light of the testimony adduced, necessarily contemplated the exercise of the right of eminent domain, they make that statement and base the presumption on the fact that the gas field was about twenty miles from the place where the gas was to be delivered; that the only means of transportation was by pipe line and that they would necessarily cross railroads, public highways and the Arkansas river. So that the conclusion is necessarily based on a presumption that private agreements could not be had under which the pipe line could be constructed. There is not a particle of evidence, and the Supreme Court of Arkansas does not intimate that there is any evidence, that they could or could not make the private arrangements, but it simply says it is unreasonable. Is it unreasonable to suppose that one could build a pipe line twenty miles when, in the pipe line cases above referred to, they built one three hundred miles by private agreement? Morover, if they contemplated becoming a public utility as to a portion of their gas, that not already sold, still the contract with us for the sale of a certain portion of the gas not devoted to public use would certainly be valid and binding.

The part of its business or gas sold to us under the contract the Clear Creek Oil & Gas Company had a right to sell, and as to this contract and the gas furnished under it, it was not a public utility. The pipe line was not laid for transporting gas as a common carrier, but the charter itself shows that its line was for the purpose of transporting its own gas. It could have sold its entire production to one person and transported it through the pipe line to that person. If it could do this, can it be doubted that it could sell a portion? It might possibly have some in excess of the contract and transport it to us through its pipe line without conducting a public utility as to this contract or as to the amount of gas. It has been repeatedly held that it is not what the charter says, but it is what a corporation does that determines its character and that you judge from that whether or not it is a public corporation. What did this company do? Sold us gas at a certain price. It represented that it had the gas to sell, and we purchased it. It also represented that it had a right to make the contract, and we contend that as to the gas sold to us it was not a public utility.

> "Although I have not been able to free my mind from doubt, the Court is of the opinion that that part of the business is not to be regarded as a public utility."
>
> Terminal Taxicab Co. vs. Chas. W. Kutz, 241 U. S. 252.

In the above case the parties were operating a taxicab company carrying passengers; that was its whole business. It was a carrier, nothing else, but it entered into a private contract, and this Court held that as to that contract it was not a public carrier, but was a public utility or public carrier as to the other passengers that it carried. In the above case the Court said:

> "The plaintiff is a Virginia corporation authorized by its charter, with copious verbiage, to build, buy, sell, let and operate automobiles, taxicabs, and other vehicles, and to carry passengers and goods by such vehicles, but not to exercise any of the powers of a public service corporation. It does business in the District, and the important thing is what it does, not what its

charter says. The first item, amounting to about .35 of the whole, is done under a lease for years from the Washington Terminal Company, the owner of the Union Railroad Station in Washington, which we have mentioned as excluded from the definition of common carriers.

"The next item of plaintiff's business, constituting about one-fourth, is under contracts with hotels, by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotels, receiving the exclusive right to solicit in and about the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service or takes it out of the definition of the act. * * * * The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so."

The Court further said:

"The decree so far as it asserts jurisdiction of the commission, is affirmed, but it must be modified so as to restrain any inquiry into the rates charged by the plaintiff at its garage or exercise of jurisdiction over the same."

And our contention is that even if the Clear Creek Oil & Gas Company became a public service corporation, thereby giving the Arkansas Corporation Commission jurisdiction over its rates, this would not apply to a private contract previously made for the sale of gas that it had a right to sell.

This Court said, in a recent case:

"While the State may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts, there is quite clearly no principle which imposes an obligation to do so merely to relieve the contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield, but it is not

an independent legislative function to abolish or set aside such contracts, however unwise or unprofitable they may be. And the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist per se. It is the intervention of the public interest which justifies and at the same time conditions its exercise."

Ark. Nat. Gas Co. vs. Ark. Railroad Commission, U. S. Adv. Sheets, April 16, 1923, p. 421. Decided March 19, 1923.

The public is not concerned or interested in any way in the case at bar, but it is an action on the part of the Clear Creek Oil & Gas Company, not in the interest of the public, but for the sole purpose of getting relieved from the burdens of what it calls an improvident undertaking. The public, as the proof shows, was being served by other concerns at the time the contract was made. Nobody intervened on the part of the public. There is no claim made that the public has any interest at all. The Clear Creek Oil & Gas Company simply seeks to get rid of what it regards as a burdensome contract, and undertakes to do so by claiming that it is a public utility, and we respectfully submit that the case last cited settles the question beyond controversy against it.

There are two reasons why the public is in no way interested and has never been interested in this case. The first is that, as the record shows, there was no public for it to serve—the public was already being served by other concerns; and the second is that the Clear Creek Oil & Gas Company wanted to sell to large concerns, such as smelters and glass factories, because it was much less trouble and expense to serve large concerns who took gas constantly, not only day and night, but throughout the entire year, and it was therefore much more profitable to the gas producer to sell to such persons. It is shown by the record that they contracted to furnish us 12,000,000 feet a day, which was all the gas they had at that time, and there was no certainty that it would have any more. To be sure, it expected to have some gas, more than enough to serve the Fort Smith Spelter Company, and it, therefore, contracted with the

Arkansas Zinc & Smelting Corporation and the Athletic Mining & Smelting Company, two large smelters, besides the Fort Smith Spelter Company. Each of the smelters took a large supply of gas and operated day and night the year round.

The contract shown at Record p. 26 requires the Gas Company to furnish any quantity of gas up to and including 150,000,000 cubic feet for each thirty days, and to be supplied constantly; and as the second parties' needs increase, to furnish additional quantities of gas.

Then the other contracts testified about show the amount of gas which the Clear Creek Oil & Gas Company subsequently sold to concerns other than the Fort Smith Spelter Company. All this clearly shows that it did not intend to sell to the public; the public was at no time in any way interested. The public is not making any contention in this suit, but it is an effort on the part of one of the contracting parties to be relieved from its contract entered into in good faith. One of the clauses in the contract provides as follows:

"WHEREAS, one of the inducements for the location of said plant upon said lands is the procurement of natural gas from the said First Party during the life of the field; and the said First Party desires to sell, and the Second Party desires to purchase, a supply of natural gas for the use in and about the construction, operation and maintenance of said smelting plant, or for other future manufacturing uses of said parties of the Second Part. It is therefore agreed," etc. (R. p. 24).

We therefore contend that the public is not interested. And we further contend that the Clear Creek Oil & Gas Company induced the Fort Smith Spelter Company to locate at Fort Smith and spend large sums of money by entering into this contract, and the evidence is undisputed that this contract was made at a time when the Clear Creek Oil & Gas Company was not a public utility and did not contemplate becoming one. Therefore, the question is raised that there is no evidence tending to show that it was either a public utility at the time it entered into the contract or contemplated ever becoming one. It never served the public; it

never intended to serve the public. It was not as profitable to serve the public as it was to serve large concerns.

Our assignment of errors raises the question that there is no evidence, and the record will not show any evidence at all tending to show these things.

Defendant in error states in its brief that plaintiff in error contended at one time, or in the Supreme Court of Arkansas contended, that there was a conflict of evidence. It is in error about this, if it means by that that we claimed that there was any conflict in evidence as to the validity of our contract or as to the Clear Creek Oil & Gas Company being a public utility. There was never any conflict in evidence on these two propositions. There was a conflict in evidence, which we argued in the Supreme Court of Arkansas, but this was a conflict on the reasonable price of gas, and nothing more. We contended there that there was a conflict and that the evidence showed that four cents was a fair price for gas to the Fort Smith Spelter Company, and that was the conflict in evidence we spoke of, and the only conflict. No mention was ever made in our argument in the Supreme Court, or elsewhere, about there being a conflict as to the Clear Creek Oil & Gas Company being a public utility at the time the contract was made. We always contended, and we contend now, that there is no evidence in the record anywhere that indicates that it was a public utility at the time the contract was made. Attorneys for defendant in error have simply confused our argument with reference to the reasonable price of gas, a conflict of evidence on that, with our argument on the proposition that it is not a public utility.

Respectfully submitted,

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Supreme Court, U. S.
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No. 266

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

FORT SMITH SPELTER COMPANY
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY
DEFENDANT IN ERROR

BRIEF OF PLAINTIFF IN ERROR

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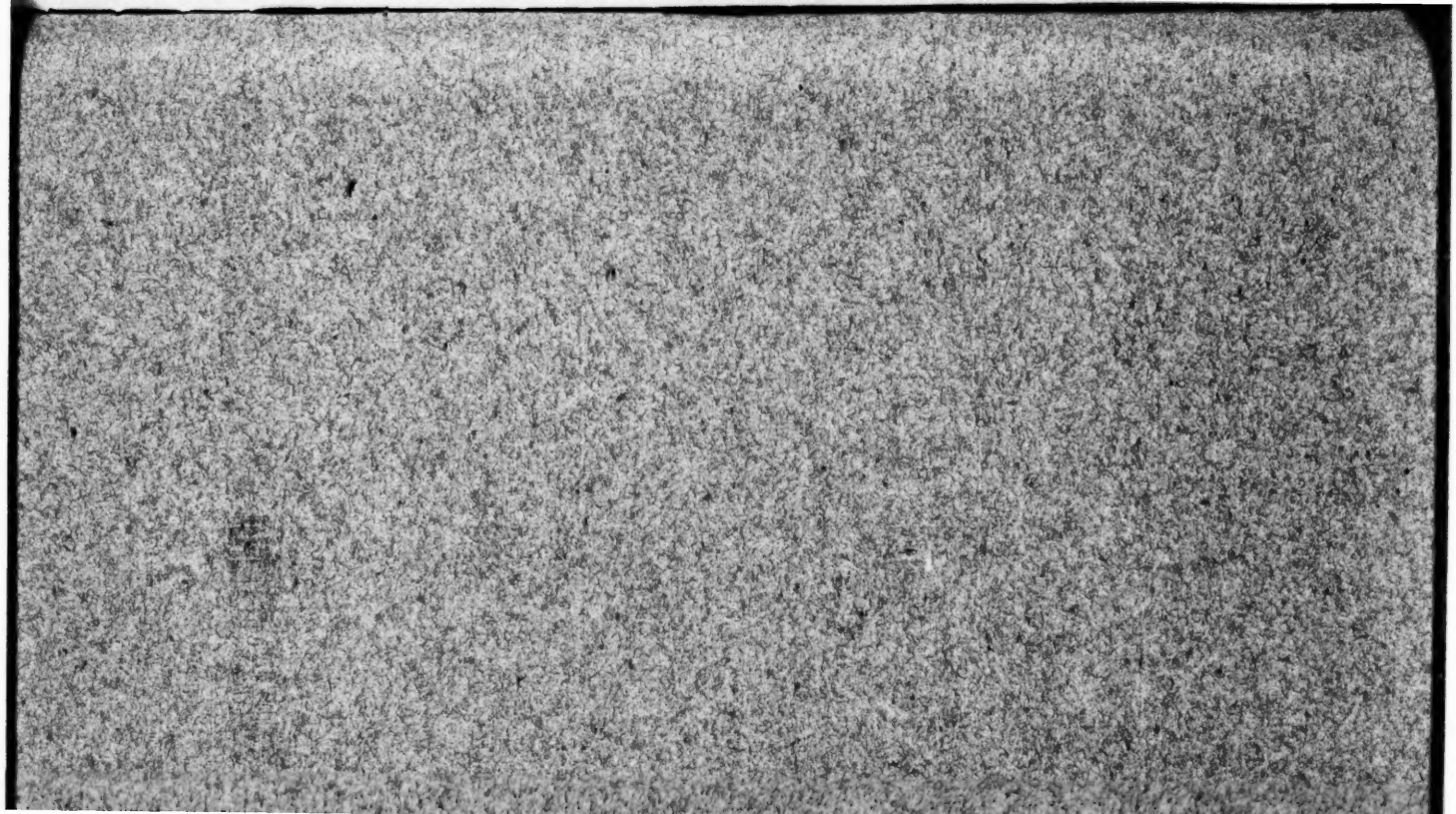

No. 774

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

FORT SMITH SPELTER COMPANY
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY
DEFENDANT IN ERROR

INDEX

	Pages
Statement of the Case and Abstract	3
Contract in Question	9
J. F. McGehee's Testimony	16
D. W. Kerr's Testimony	21
Assignment of Errors	22
Argument	24

CITATIONS

	Pages
Clear Creek Oil & Gas Co. vs. Fort Smith Spelter Co. et. al., 274 Fed. 906	7, 27
Terminal Taxicab Co. vs. Chas. W. Kutz, 241 U. S. 252	28
Allen vs. Railroad Commission of California, 175 Pac. 466	29
Railroad Commission vs. Allen, 249 U. S. 601, 63 Law. Ed. 797	29

CITATIONS—Continued

Page

Fidelity State Bank vs. N. Y. Highway District, 31 A. L. R. 781 34

Ga. Ry. & Power Co. vs. Decatur, decided by this Court June 4, 1923 35

New Orleans Water Works vs. La. Sugar Ref. Co., 125 U. S. 18 35

Bryan vs. Board of Education, 151 U. S. 639 35

McGahay vs. Virginia, 135 U. S. 662 35

Delmar vs. Merchant's Mutual Ins. Co., 14 Wall 661 35

J. J. Douglas vs. Commonwealth of Ky., 168 U. S. 448 35

Creswell vs. Knights of Pythias, 225 U. S. 261 35

Frank vs. Magnum, 237 U. S. 347 35

K. C. S. Ry. Co. vs. Albers Com. Co., 223 U. S. 591 36

United States et al. vs. Ohio Oil Co., 234 U. S. 546 37

Ark. Natural Gas Co. vs. Ark. Railroad Commission, 261 U. S. 379, 67 Law Ed. 705 38

No. 774

IN THE

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OCTOBER TERM, 1923

FORT SMITH SPELTER COMPANY
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY
DEFENDANT IN ERROR

STATEMENT OF THE CASE AND ABSTRACT

The Clear Creek Oil & Gas Company, defendant in error, was organized as a corporation under the laws of the State of Arkansas on July 25, 1914. Its principal place of business was located in Fort Smith, Arkansas. Among its charter provisions was the following:

> "For the purpose of sinking wells, boring for, providing and transporting crude oil and natural gas, coal, asphalt and any other minerals which may be found in the development of their property." (Record, p. 21.)

Subsequent to incorporation this company acquired leases on some 25,000 or 30,000 acres of land in Crawford county, Arkansas, a county just north of and adjoining the county of Sebastain, in which the City of Fort Smith is located. Drilling was started on these leases some time prior to November 1915 and about November 12th, 1915 the first gas well was brought in, producing about twelve million cubic

feet of gas per day. (Record, p. 30.) This well was located about five miles from the City of Van Buren, Crawford county, Arkansas and about fifteen miles from the City of Fort Smith, Arkansas. These two cities were being fully supplied with gas by other gas producing companies for both domestic and commercial purposes. (Record, p. 31.) Before drilling any other well, the Clear Creek Oil & Gas Company set about to find a market for their gas. Along in March 1916, about five months after the date of the bringing in of the discovery well aforesaid, two gentlemen by the name of D. W. Kerr and H. S. Buck, came to Fort Smith looking for a location for a smelting plant, at the time they did not seem satisfied with Fort Smith and went to Clinton, Oklahoma, seeking a location. Certain officials of the Clear Creek Oil & Gas Company upon hearing of the intention of these gentlemen, went to Oklahoma and induced them to return to Fort Smith and entered into the Contract in question, which is set out in full in the Record, pages 23-29, and which contract was duly assigned to the Fort Smith Spelter Company, plaintiff in error, immediately after its execution. Under its terms the Clear Creek Oil & Gas Company agreed to furnish to the Fort Smith Spelter Company gas at the rate of twelve million cubic feet per day during the life of the field, at a price of four cents per thousand cubic feet, and to give to the Ft. Smith Spelter Company first call on its gas up to that amount. As contracts were subsequently made with others, the Fort Smith Spelter Company was to have its quota before such subsequent contracts could be fulfilled. At the time this contract was made the Clear Creek Oil & Gas Company had no pipe lines and had not contracted for any; it had only one gas well; it had no market for its gas and had not sold a foot of gas to anyone. (Record 48, 49.)

The contract in question contained among others the following provisions:

FIRST CALL OF GAS

"Tenth. It is expressly understood and agreed, and notice to third parties hereby is given accordingly, that said second parties shall have first call upon the gas supplies of said first party now being, or which may hereafter be, obtained from any land within the counties hereinbefore mentioned, or other territory which may be ac-

quired by first party, and that the right of said second parties to receive and take or to be supplied with the gas hereunder, from said territory, is prior and superior to any contract or agreement made or which may be made by said first party, for the furnishing of gas to others, from said territory. Said second parties agree to take their entire supply of gas from first party so long as the latter is able to furnish it, and in (fol. 41) the event party of the first part is ever unable to supply the entire needs of second parties, then second parties shall take from the first party all the gas they may need which party of the first part is able to supply.

EXCESS 15% CLAUSE

"Eleventh. Inasmuch as the general supply of natural gas is of uncertain duration, and the construction, maintenance and successful operation of said smelting plant will require a heavy investment of capital and an abundance and staple supply of natural gas; and to the end that the supply now being, or which may be hereafter obtained by said party from the territory aforesaid may be conserved for the purpose of this contract, and as one of the inducements and considerations for the location of said smelter, said first party expressly covenants and agrees to and with said second parties, that so long as this contract remains in force, said first party will not either directly or indirectly supply or furnish natural gas from the territory covered by this contract, to consumers or others in an amount exceeding in the aggregate fifteen per cent (15%) open flow test of the total volume of gas being produced or procured, or both, from time to time, by said first party, from the territory comprising the source of supply hereafter. If, however, it can be demonstrated and shown to the reasonable satisfaction of second parties, that twenty per cent (20%) open flow will not endanger or shorten the life of the field, then in such event, the twenty per cent open flow will be satisfactory to both parties.

LENGTH OF TIME OF CONTRACT

"Twelfth. This contract shall be and remain in force so long as gas in sufficient quantities to comply

with the terms of this contract can be produced from the territory hereinbefore mentioned, now held by the first party or which may hereafter be held or controlled, directly or indirectly, by it, and which may be produced by reasonable diligent development and operation of land within the territory above described; provided, that in case the supply of gas hereunder at any time, permanently or temporarily fails or falls below the required quantity to be furnished as provided by article number 7 above, the second party shall have the right, at their election, to (fol. 42) continue this contract in force and to continue to make and receive hereunder, such lesser quantities of gas as the first party may be able to supply, in which event, and if necessary, the fifteen per cent or twenty per cent open flow restriction shall be temporarily removed, or permanently, if proven necessary to insure a sufficient and continuous supply of gas to second parties.

FACTORY SITE

"Thirteenth. This contract is conditional on the second parties securing a satisfactory site with switches and tracks free and without cost to second parties."

Following the making of this contract, the Fort Smith Spelter Company built a smelting plant at South Fort Smith, Arkansas, about twenty miles from the gas field of the Clear Creek Oil and Gas Company, at a cost of about $300,000.00, (Record, p. 92.) and began operating under said contract. It continued to so operate under the contract without any complaint from the Clear Creek Oil & Gas Company for about four years, when the Clear Creek Oil & Gas Company, on learning that it could sell its gas for a higher price than that stipulated in its contract with the Fort Smith Spelter Company, attempted by negotiation to induce the Spelter Company to abrogate the contract under which it was then taking gas and enter into a new one for a higher price. The Fort Smith Spelter Company refused to modify the terms of its contract, except upon conditions and terms that it should name. No agreement was ever reached, however, the Clear Creek Oil & Gas Company claimed that in its negotiations with the Fort Smith Spelter Company that an agreement had been reached whereby the Smelter Company was to pay a

higher price for gas than that stipulated in the contract in question, and that therefore, said contract had been modified as to the price of gas. The Clear Creek Oil & Gas Company accordingly filed suit in the Chancery Court at Fort Smith, Arkansas, in an effort to enforce such alleged agreement. The Fort Smith Spelter Company then filed petition and bond for the removal of said suit to the United States District Court at Fort Smith. The case was removed and the Smelter Company filed its answer alleging the validity of the contract now in controversy, that it had not agreed to modify said contract or to change the price of gas as stipulated in said contract. After testimony was taken, the case was transferred to the law docket and after the testimony was all in, the District Judge directed a verdict for the Fort Smith Spelter Company. Thereupon an appeal was taken to the Circuit Court of Appeals by the Clear Creek Oil & Gas Company and the case was decided on the 9th of June, 1921, affirming the lower court, holding that the contract to modify the rate had never been entered into by the Fort Smith Spelter Company (Clear Creek Oil & Gas Co. vs. Fort Smith Spelter Co. et al, 274 Fed. 906.)

The Clear Creek Oil & Gas Company on March 17, 1920, four years after the contract in controversy had been entered into, filed its application before the Arkansas Corporation Commission, (now the Arkansas Railroad Commission) alleging for the first time that it was a public utility; that its rates were confiscatory and asking that a reasonable rate be fixed. (Record, pp. 3-11.) The commission granted the petition of the Clear Creek Oil & Gas Company and ordered the gas rate raised to approximately nine (9) cents to the Fort Smith Spelter Company. The Spelter Company then appealed from the finding of the commission to the Pulaski County Circuit Court, which is the tribunal under Section 27, Act 571, of Arkansas in which to contest the finding of the Corporation Commission. The Circuit Court held the contract in controversy valid and binding, reversed the finding of the Corporation Commission and dismissed the petition. The Clear Creek Oil & Gas Company then appealed to the Supreme Court of Arkansas and it reversed the Pulaski Circuit Court's decision. (Record, p. 152.) As the Pulaski Circuit Court had not tried the case upon its merits, it was re-

manded there for trial. On the second trial the court held that the opinion of the Supreme Court bound it to sustain the Corporation Commission and did so. The plaintiff in error appealed from that decision and the Supreme Court reversed that decision, holding that the court should determine the rates on the evidence which had been heard before the Corporation Commission. (Record, pp. 160-162.) On the remand to the Pulaski Circuit Court, it was again tried and the court established a seven cent (7c) rate in lieu of the rate established by the Corporation Commission. Both parties appealed from this decision and the Supreme Court of Arkansas again reversed the Pulaski Circuit Court and held that the rates established by the Corporation Commission (now the Arkansas Railroad Commission) were sustained by the evidence and again sent the case back to the Pulaski Circuit Court to enforce the rates of the Corporation Commission. (Record, pp. 163-166.) Thereupon the Fort Smith Spelter Company filed its petition for a rehearing before the Arkansas Supreme Court, which was denied. This action of the Arkansas Supreme Court, the highest court in the State to which the plaintiff in error could appeal, constituted a final ruling on the case and this cause is now before this court on a writ of error.

On July 25, 1914, the Clear Creek Oil & Gas Company was organized under the laws of Arkansas as a corporation. Its charter contained the following provisions:

> "For the purpose of sinking wells, boring for, providing and transporting crude oil and natural gas, coal, asphalt and any other minerals which may be found in the development of their property.
>
> Also to purchase, hold, transfer, convey and lease such real and personal property as the legitimate purposes of the corporation may require.
>
> Also to borrow money, to issue bonds, and to pledge its property for the security of same, and the entering into of all obligations and contracts essential to the transaction of its affairs or for the purposes of the corporation.
>
> Also to have and hold, to enjoy and to exercise all the privileges and benefits conferred by the laws of the

State of Arkansas, (fol. 32) upon corporations for manufacturing and other lawful business."

On March 17, 1916, the Clear Creek Oil & Gas Company entered into the contract in controversy in this case with D. W. Kerr and H. S. Buck and on the same day, or the day following, after its execution, the said contract was assigned and transferred to the Fort Smith Spelter Company, plaintiff in error. This contract is as follows:

CONTRACT—

NAME OF PARTIES TO AGREEMENT

"This Agreement, made and entered into by and between the Clear Creek Oil & Gas Company, a corporation organized and doing business under and by virtue of the laws of the State of Arkansas, party of the first part, and D. W. Kerr and H. S Buck, parties of the second part: which terms 'party of the first part' and 'parties of the second part' shall include their respective heirs, administrators, executors, successors and assigns.

DESCRIPTION OF LEASES

"Witnesseth: That, Whereas, said party of the first part owns or controls, by contract or otherwise, the right to produce, take or market natural gas from certain lands situated in the counties of Crawford, Franklin and Sebastian, or other territory in the State of Arkansas or the State of Oklahoma, now comprising a total of 30,000 acres, more or less, as covered by blue print plat attached; and

ACQUIRING LEASES AND PURCHASE GAS

"Whereas, the first party intends and agrees to procure by lease, sub-lease, contract or purchase, gas, for use under this contract, upon lands in addition to those which it now holds, owns or controls; and,

SMELTING PLANT

"Whereas, said parties of the second part intend primarily to construct a smelting plant for the smelting

of zinc or other ores at Fort Smith, in the State of Arkansas; and,

INDUCEMENT FOR ERECTING SMELTER

"Whereas, one of the inducements for the location of said plant upon said lands is the procurement of natural gas from the said first party, during the life of the field, and the said first party desires to sell, and the said second parties desire to purchase a supply of natural gas for use in and about the construction, operation and maintenance of said smelting plant, or, for other future manufacturing uses of said parties of the second part;

"Now, therefore, in consideration of the premises and of the covenants and agreements hereinafter contained, it is agreed by and between the parties hereto, as follows:

AGREEMENT TO FURNISH AND TAKE GAS

"First. Said first party agrees to furnish and deliver and said second party agrees to accept and receive, at the gas meter hereinafter provided for, dry and merchantable gas, to be furnished from the territory heretofore mentioned and shown by blue print attached, for use in the construction, operation and maintenance of second parties' works.

TIME CONSTRUCTION OF PLANT

"Second. Said second parties, to show their good faith in the fulfillment of this contract, are to commence the construction of said smelting plant within fifteen (15) days after the execution and delivery of this contract and to prosecute said construction with due diligence and dispatch, and party of the first part agrees to begin the delivery of said gas, according to the terms of this contract, if so required by parties of the second part, not later than ninety (90) days from the execution of this contract.

METER

"Third. For the purpose of measuring said gas, said first party shall at its own cost and expense, install

and maintain at some suitable point, to be selected by said second parties, upon the site of their works aforesaid, a good and sufficient standard proportional gas meter (The Industrial Instrument Company's Orifice Meter, or equal) and the delivery of said gas shall be made at a pressure of not less than ten (10) pounds to the square inch, at said meter. Said meter shall be read daily by said first party, and each reading thereof shall be conclusive upon both parties hereto, unless objection be made thereto within forty-five days after the said meter is read; and it is agreed further that said second parties shall have the right to be present, by their representative, at any reading of said meter, and at the testing of the same at any time, should they wish to do so.

METER TESTING AND READING

"Fourth. Either party hereto may require a test of said meter or of any meter or meters substituted therefor, as hereinafter provided, to be made upon giving the other fifteen (15) days written notice thereof. If, upon the making of any such test, said meter or (fol. 38) meters is or are found to be registering correctly, the expense thereof shall be borne by the party demanding the same, but if incorrectly, such expense shall be borne by the other party hereto; and it is agreed that any meter which varies three per cent (3%) or less, shall be considered as registering correctly. If any meter fails to register or upon test as aforesaid, is found to be registering incorrectly, such meter shall immediately be placed in condition to register correctly, or another meter registering correctly, substituted therefor; and the reading of such corrected or substituted meter for the period of time following such incorrect registration or failure to register—shall—taking into consideration the line pressure and number of blocks of said plant operated—to be the basis for determining the amount of gas during such incorrect registration or failure to register.

"Fifth. Either party hereto shall have the right, at seasonable hours, to read, inspect and examine the gas meters and registers of the other.

"Sixth. Said second parties agree to pay for all the

gas delivered under this contract, at the rate of four cents (4c) for each thousand cubic feet, upon the basis of eight ounce pressure at the meter, located on the consumers property with the proper multiplier, applied according to the usages of the gas trade; and the time of payment for gas used during any month shall be on the 15th of the month following that in which the gas is consumed. Payment may be made directly to said first parties or deposited to its credit, in any reliable bank in Fort Smith, Arkansas, as may be desired by first party and mutually agreed upon.

QUANTITIES GAS AND NOTICE OF INCREASE OF QUANTITY

"Seventh. Said first party agrees to furnish to the second parties, whatever amount of gas may be required and requested by the second parties under this contract, until the expiration of one hundred sixty (160) days from the execution of this contract; and further agrees (fol. 39) to furnish the second parties, and the second parties agree to accept hereunder, beginning one hundred sixty (160) days from the date of the execution of this contract, (not less than sixty million (60,000,000) cubic feet, as a minimum) of gas, for each thirty days (30) thereof, until September 1, 1918—at which time the accepting of any exact stipulated quantity by second parties, shall not be required; and it is agreed that the second parties shall have the right to demand and receive from said first party, any quantity up to and including one hundred fifty million (150,000,000) cubic feet for each thirty (30) days, and to be supplied continuously, as required by second parties; and it is further agreed that if the second parties needs shall increase so as to require additional gas to that hereinbefore provided, said second parties shall give one hundred twenty (120) days notice, in writing to the first party, of the additional quantity of gas necessary, and the first party agrees and promises that within one hundred twenty (120) days after receiving said notice, it will furnish to the second parties, additional quantities of gas, as required by said notice, except as provided in article number 12, relative to the life of the field; provided that in no event shall first party be required to

furnish more than three hundred sixty million (360,000,000) cubic feet, as a maximum, for each thirty (30) days thereafter, during the life of this contract.

PROVIDING FOR SHUT-DOWNS OF PLANT AND DESTRUCTION OF SAME

"Eighth. It is further agreed, that in case said smelting plant be destroyed or the operation thereof prevented, permanently or temporarily by strikes, fire, cyclone, tornado, windstorm, explosion, injunction, order or other process of any court, commission or tribunal, or by inability to procure ores when seasonably ordered, or by other similar or different acts beyond the control of said second parties, said second parties shall not be required to take gas hereunder, nor to pay for the same except such as may be actually received and used, while the operation thereof is so prevented, and shall (fol. 40) be under no obligation to make up the deficiency by the use of gas thereafter, provided and it is expressly agreed that in case of said smelting plant is rebuilt or restored and cause of prevention in operation removed, the receipt and use of gas hereunder shall be promptly resumed, providing further, and it is further agreed, that if said plant be destroyed, second parties shall elect within ninety (90) days after such destruction, whether it will rebuild same, and if they elect to do so, the rebuilding thereof shall be commenced within ninety (90) days after such election, and shall be prosecuted with reasonable diligence to completion.

DAMAGES TO PERSON ON ACCOUNT OF HANDLING GAS

"Ninth. Said first party agrees to bear and to hold said second parties harmless from and indemnified against all damages to the person or property of third parties, or of second parties, caused in the furnishing, transportation and handling of said gas at and before the same passes from said point of delivery thereof to said first party harmless from and indemnified against all damages to the person or property of third parties, or of the said first part, caused in the handling or use of said gas, after the same passes said point of delivery.

FIRST CALL OF GAS

"Tenth. It is expressly understood and agreed, and notice to third parties hereby is given accordingly, that said second parties shall have first call upon the gas supplies of said first party now being, or which may hereafter be, obtained from any land within the counties hereinbefore mentioned, or other territory which may be acquired by first party, and that the right of said second parties to receive and take or to be supplied with the gas hereunder, from said territory, is prior and superior to any contract or agreement made or which may be made by said first party, for the furnishing of gas to others, from said territory. Said second parties agree to take their entire supply of gas from first party so long as the latter is able to furnish it, and in (fol. 41) the event party of the first part is ever unable to supply the entire needs of second parties, then second parties shall take from the first party all the gas they may need which party of the first part is able to supply.

EXCESS 15% CLAUSE

"Eleventh. Inasmuch as the general supply of natural gas is of uncertain duration, and the construction, maintenance and successful operation of said smelting plant will require a heavy investment of capital and an abundance, and staple supply of natural gas; and to the end that the supply now being, or which may be hereafter obtained by said party from the territory aforesaid may be conserved for the purpose of this contract, and as one of the inducements and considerations for the location of said smelter, said first party expressly covenants and agrees to and with said second parties, that so long as this contract remains in force, said first party will not either directly or indirectly supply or furnish natural gas from the territory covered by this contract, to consumers or others in an amount exceeding in the aggregate fifteen per cent (15%) open flow test of the total volume of gas being produced or procured, or both, from time to time, by said first party, from the territory comprising the source of supply hereafter. If, however, it can be demonstrated and shown to the reasonable satisfaction of second parties, that twenty per cent (20%) open flow

will not endanger or shorten the life of the field, then, in such event, the twenty per cent open flow will be satisfactory to both parties.

LENGTH OF TIME OF CONTRACT

"Twelfth. This contract shall be and remain in force so long as sufficient quantities to comply with the terms of this contract can be produced from the territory hereinbefore mentioned, now held by the first party or which may hereafter be held or controlled, directly or indirectly, by it, and which may be produced by reasonable diligent development and operation of land within the territory above described; provided, that in case the supply of gas hereunder at any time, permanently or temporarily fails or falls below the required quantity to be furnished as provided by article number 7 above, the second party shall have the right, at their election to (fol. 42) continue this contract in force and to continue to make and receive hereunder, such lesser quantities of gas as the first party may be able to supply, in which event, and if necessary, the fifteen per cent or twenty per cent open flow restriction shall be temporarily removed, or permanently, if proven necessary to insure a sufficient and continuous supply of gas to second parties.

FACTORY SITE

"Thirteenth. This contract is conditional on the second parties securing a satisfactory site with switches and tracks free and without cost to second parties.

SELLING LESS THAN 4c PROVIDED FOR LIKE REDUCTION OR RUNNING AT LOSS

"Fourteenth. It is further agreed by the parties hereto, that if market or other conditions at any time shall cause the plant of said second parties to be operated at less than a reasonable profit (for instance, to net less than 6% on the capital invested,) while paying the price for gas provided in the foregoing then the first party shall make a reasonable reduction in the price of gas, during such periods; provided, that first party shall have access to the cost records of the second parties, enabling first party to determine the proper adjustments.

It is also agreed that should first party ever sell or make any contracts to consumers or others, except churches, schools, hospitals or charitable institutions, at a less rate of price than governs this contract, then, in such event, second party shall pay for all gas consumed on a price basis equal to such lower price or prices during the entire time they are in effect.

AUTHORITY FOR SIGNATURES

"In testimony whereof, party of the first part has by order of its board of directors, hereunto caused these presents to be signed by its president, and attested by its secretary, and caused its corporate seal to be hereunto affixed, and said parties of the second part have hereunto set their hands and seals, this Seventeenth Day of March, 1916.

Clear Creek Oil & Gas Company, by J. F. McGehee, President. D. W. Kerr, H. S. Buck.

Attest: R. S. Robertson, Sec'y (Seal) (Tr. 8-17.)"

J. F. McGEHEE TESTIFIED IN SUBSTANCE

That he is president and general manager of the Clear Creek Oil & Gas Company, that the company was incorporated on the 25th day of July, 1924. Following incorporation about 25,000 or 30,000 acres of leases were obtained in Crawford county, Arkansas, at a cost of about $30,000. The first development was begun in 1915, fall, when the first well producing about twelve million feet of gas was brought in. This well cost about $45,000 completed. The next step was to sell this gas. Fort Smith and Van Buren, the two nearby cities were being supplied at the time by other gas producers with gas both for factories and domestic purposes. This gas was coming from the Mazzard and Poteau fields. The Poteau field was about thirty miles away. The first move they made to sell their gas was to make a contract with D. W. Kerr and H. S. Buck, now the Fort Smith Spelter Company. This contract was made and entered into on March 17, 1916. At that time they had just one well, producing twelve million feet. The smelter under the contract was to be located at South Ft. Smith. At that time no pipe line had been constructed; no

contract had been let for same. The size of the pipe-line was not mentioned. The contract provided, among other things, that:

> "This contract is conditioned on the second parties securing a satisfactory site with switches and tracks free and without cost to second parties."
>
> "Whereas second parties intend primarily to construct a smelter plant for the smeltering of zinc or other ores at South Fort Smith in the State of Arkansas."
>
> "It is expressly understood and agreed, and notice to third parties hereby is given accordingly, that said second parties shall have first call upon the gas supplies of said first party now being, or which may hereafter be, obtained from any land within the counties hereinbefore mentioned, or other territory which may be acquired by first party, and that the right of said second parties to receive and take or to be supplied with the gas hereunder, from said territory, is prior and superior to any contract or agreement made or which may be made by said first party, for the furnishing of gas to others, from said territory. Said second parties agree to take their entire supply of gas from first party so long as the latter is able to furnish it, and in (fol. 41) the event party of the first part is ever unable to supply the entire needs of second parties, then second parties shall take from the first party all the gas they may need which party of the first part is able to supply." (R. pp. 29-32.)

The pipe line was constructed to South Fort Smith as soon as they could get the pipe and was finished in about ninety days. It was finished about the time that the smelter in Fort Smith was finished.

The second contract for the sale of gas was made by Vogelstein and Company on the 3rd day of May, 1916 (R. p. 34).

The third contract was made on the 8th day of November 1916, with Mr. Charles T. Orr. Under the period of development from November, 1915, to November, 1916, about ten producing wells were brought in with about 87,725,000 cubic feet of gas per day (R. p. 35).

Following these three contracts other contracts were made with various industries until there were about nineteen contracts in all. All these industries were supplied with gas until the fall and winter of 1918—development had stopped and they did not have enough gas for all of them. An attempt was made to get the price of gas raised and failing to do so and not having money to drill, they began cutting off customers. These smelters were notified of these conditions and were asked to increase the price of gas. They refused. No more drilling was carried on until the first part of 1919, when one more well was drilled. An attempt was made to cut off several consumers, but injunctions were obtained against such action. All consumers were cut off except those who prevented them from cutting them off by an injunction. Some they could cut off and did cut off, only those stayed on the line that were protected by injunction or orders of the fuel administration (R. pp. 36-40).

At the time the contract was entered into with the Fort Smith Spelter Company, the prevailing price of gas to smelters in Oklahoma was from three to four cents, that is, to big consumers like smelters. The price of gas now to smelters, he thought, is about ten or twelve cents. To supply gas for commercial purposes, as to smelter companies and glass plants, requires a rock pressure of one hundred pounds. The pressure in the Williams field now has an average of 170 to 160 pounds; in the Kibler field it is less than 100 pounds. (R. p. 46).

Certified copy of the order of the County Court of Crawford county with reference to the use of roads for pipe lines is dated April 5, 1916 (R. p. 47).

The rock pressure above referred to was on January 12, 1920 (R. p. 48).

The contract in question in this case, which was originally made between the Clear Creek Oil & Gas Company and D. W. Kerr and H. S. Buck on March 17, 1916, was assigned by Buck and Kerr to Fort Smith Spelter Company. At the time the contract was entered into, March 17, 1916, the Clear Creek Oil & Gas Company had no pipe line; it had contracted for none; it had one gas well and leases of some 25,000 or 30,000 acres of supposed gas land, a great part of these leases

have since turned out to be non-gas land. At the time the contract was entered into the Clear Creek Oil & Gas Company was not selling gas to any person, firm or corporation, and had made no contract with any person, firm or corporation to sell gas. They had never exercised any right under the franchise secured from the towns of Alma, Clarksville and Conway. They built no pipe lines to these towns. They furnished no gas to any of these towns. They did nothing under these franchises, or exercised any rights under said franchises. They have not produced any orders passed by these towns granting said franchises (R. pp. 48, 49).

The plant of the Fort Smith Spelter Company is located outside the city limits of the city of Fort Smith. The length of the pipe lines constructed from Kibler field to its terminus at South Fort Smith to the Fort Smith Spelter Company is about eighten or twenty miles (R. pp. 50, 51).

The largest well that they brought in was the initial well of about twelve million feet, the other ten wells ran from four to twelve million feet; they ran about half and half.

At the time they made the second contract, or after they had made the first contract with the Fort Smith Spelter Company, and made a second contract with the Arkansas Zinc and Smelting Company, we required them to agree that they would take their gas subject to the rights of the Fort Smith Spelter Company. It was at the instance of the Clear Creek Oil & Gas Company that it was written in the contract.

When they entered into the third contract with Charles T. Orr, which afterwards became the Athletic Mining & Smelting Company, they required also that it be written in the contract that its right to take gas was subject to the rights of the two smelters in the order of their contracts. They did the same thing with the two glass factories, subsequently contracted with. The two glass factories were not here when the Clear Creek Oil & Gas Company brought in their first well. They were brought here and their glass plants constructed just as the plants of the three smelters, at the solicitation of the Clear Creek Oil & Gas Company (R. p. 53).

Probably Mr. Kerr did go to Clinton to look over the gas field there before locating in Fort Smith. The Clear Creek

Oil & Gas Company had heard at the time they made the contract with the Fort Smith Spelter Company that Oklahoma was offering gas for sale at 3 1/2c and are still selling at that. However, Mr. McGehee testified that he had not investigated the gas fields of Oklahoma and did not know just what gas is selling at there, all that he knew was what he had heard.

The consumption of the Fort Smith Spelter Company is 3,800,000 feet of gas per day. They operate about 365 days in the year. While operating, they operate on Sunday the same as any other day and also operate day and night. They take practically the same every day, taking perhaps a little more in the winter than in the summer, because it takes more to heat the metal, it runs reasonably constant, however. Glass factories are not nearly as desirable companies as smelters from a financial standpoint (R. pp. 57-59).

At the time the contract was entered into they were endeavoring to induce the Ft. Smith Spelter Co., and Mr. Hothorn to come to Fort Smith, and they made the contract with the Fort Smith Spelter Company thereby inducing it to come. Mr. McGehee stated that it was his information that they made the contract with the Fort Smith Spelter Company, or Kerr and Buck, when they saw that they were figuring on going elsewhere (R. p. 64).

Mr. McGehee said that all that he testified about the gas anywhere, except his own gas company, is hear say, he knew nothing about it of his own knowledge.

They hired Mr. Hardin to go and get the franchise referred to above, this was after the contract with the Fort Smith Spelter Company had been entered into. He did not know whether the Fort Smith Spelter Company knew anything about their requiring the franchises. The papers were full of it (R. p. 67).

Buck and Kerr were non-residents of Arkansas and live in the north somewhere (R. p. 68).

They have eight industrial consumers outside of the five contracts. Each of the contracts runs for a definite period of time, or at least it runs for a definite period of time in this way, if at any time the flow of the wells decreases they can cut them off. They are not bound to furnish them for any

definite time. They have written contracts with all the consumers. Speaking from memory, Mr. McGehee stated that each of these written contracts limits the company's liability to furnish gas for a definite period of time. As a matter of fact, they agreed in written contracts to furnish gas to consumers at a price of ten, twelve, thirteen and fifteen cents quite a while prior to filing any rates with the Corporation Commission. At least this was true with six. There are two, he thought, that they might not have a contract with at this price—the contract is an old one (R. pp. 72-74).

At the time they entered into the contract with the Arkansas Zinc and Smelting Company, the second contract entered into, they had already contracted to deliver as much as twelve million feet of gas per day to the Fort Smith Spelter Company if they required it by building their plant to capacity. They could not deliver this twelve million feet of gas per day to this company and at the same time deliver gas to Mr. Hawthorne under contract with them, through a three inch line. They could not get twelve million feet through a three inch line to South Fort Smith under any pressure. They never transported any gas through the pipe line except that produced and developed by them. Mr. McGehee stated that he thought they offered to transport gas for Mr. Cazort, that is the only time we ever offered to do so (R. pp. 76-78).

MR. D. W. KERR testified in substance as follows:

That he lived at Warren, Ohio. That the Fort Smith Spelter Company contract, the one in question in this case, was made by him and Mr. H. S. Buck and assigned it to the Fort Smith Spelter Company. That he visited Fort Smith in March, 1916, for the first time. He went there to investigate gas. He first went to Clinton, Oklahoma, investigated that field and made progress toward writing a contract, but that he heard of Fort Smith gas and that he and Mr. Buck came to Fort Smith and after talking to a Mr. Echols, became rather discouraged and were about to leave. That just before they left they met Mr. Robertson and Mr. Speer, who said they had gas. They went back to Muskogee however, where Mr. Robertson and Speer, representing the Clear Creek Oil & Gas Company, came over to see them. He came back with them to Fort Smith and within a day or two closed up

the contract in question in this case on March 17, 1916, which provides for four cent gas. They would not have located at Fort Smith but for the four cent contract. They would have located at Clinton, Oklahoma. There were a number of months in Fort Smith that they could not make any profit on four cent gas. They figured on going to Clinton or Chicotha. Smelters were located at Clinton, Oklahoma by other parties, they were paying three or three and one-half cents for gas and are still running.

Mr. Kerr stated that he would not think of building a smelter with eight or ten cent gas. He would not think of putting money into it. There is a double risk in the smelter business; there is the risk of the gas playing out as well as your own risk in the business. They could have gotten gas at any number of places when they built that smelter at Fort Smith. In Louisiana they had an offer of two cents for all the gas they wanted. (Record, pp. 88-93.)

ASSIGNMENT OF ERRORS

And now comes the Fort Smith Spelter Company, plaintiff in error, and says that in the record aforesaid there is manifest error and it, therefore, states that the errors therein which it intends to rely on at the hearing are as follows to-wit:

1. The Supreme Court of Arkansas erred in holding and deciding that the Clear Creek Oil & Gas Company was a public service corporation or contemplated becoming such when the contracts were made with the Fort Smith Spelter Co.

2. The Supreme Court of Arkansas erred in holding and deciding that the order of the Corporation Commission of the State of Arkansas does not impair the obligations of the private contracts between the Fort Smith Spelter Company and Clear Creek Oil & Gas Company, and that said order is valid.

3. The Supreme Court of Arkansas erred in holding and deciding that the contracts between the Fort Smith Spelter Company and Clear Creek Oil & Gas Company are void, this decision of the Supreme Court of

Arkansas being violative of and contrary to Article 1, Section X, of the Constitution of the United States.

4. The Supreme Court of Arkansas erred in holding and deciding that the order of the Corporation Commission which destroyed the contractual property rights of the Fort Smith Spelter Company, in violation of Art. XIV, Section 1 of the Constitution of the United States was a valid order.

5. The Supreme Court of Arkansas erred in holding and deciding that the contracts on their face and in the light of testimony, contemplated the exercise of eminent domain by Clear Creek Oil & Gas Company.

6. The Supreme Court of Arkansas erred in holding and deciding (fol. 308) that the Clear Creek Oil & Gas Company had a right to have the contracts set aside in its suit where the public was not a party and was not concerned.

7. The Supreme Court of Arkansas erred in holding and deciding that the contracts were not valid (R. p. 188).

As we view this case the only question for this court to decide is this: "Is the contract in question, which was entered into on March 17, 1916 by the Clear Creek Oil & Gas Company and Fort Smith Spelter Company, a valid and binding one and therefore not subject to change or modification by the Arkansas Corporation Commission (now the Railroad Commission?")

If it is a binding contract, as we contend, then the action of the Arkansas Railroad Commission and subsequent affirmance of the action of this commission by the Supreme Court of Arkansas in holding that the contract is not binding but subject to modification, is violative of Art. 1, Section 10 and Article 14, Section 1 of the Constitution of the United States.

We also contend that the Supreme Court of Arkansas erred in holding that the Clear Creek Oil & Gas Company, defendant in error, had a right to have the contract in question set aside or modified in its suit where the public was in no way concerned and was not a party to the suit.

ARGUMENT

THE CLEAR CREEK OIL & GAS COMPANY WAS NOT A PUBLIC SERVICE CORPORATION AND DID NOT CONTEMPLATE BECOMING SUCH AT THE TIME THE CONTRACT WAS MADE.

The Supreme Court of Arkansas in deciding the case said:

> "There is little, if any, conflict in the testimony so far as we regard it as material." (Record, p. 153.)

And the Supreme Court of Arkansas also said:

> "It was within the charter rights of appellant to operate a business as a public utility in the production, transportation or sale of natural gas, but it was not limited to such operation, as a public utility and was not bound to so operate. It was authorized to do business in the production, transportation or sale of the commodities named, other than as a public utility. The question therefore is not merely whether it was authorized to operate as a public utility, but whether it elected to do so under the power thus conferred. It had a right to exercise those powers or not to do so, and in the event of its election not to do so, it could enter into private contracts not subject to public control or regulation. In other words appellant was not necessarily a public utility because its charter authorized it to become (fol. 248) one in the operation of its business, nor was it under its charter a public service corporation merely by the operation of a private business of the kind enumerated." (Record, p. 156.)

The above is the construction placed upon the statute, under which the Clear Creek Oil & Gas Company was organized, by the Supreme Court of Arkansas. It will be observed that the Supreme Court expressly held that it was not a public utility because its charter authorized it to become one and it was not a public service corporation merely by the operation of the private business of the kind enumerated. In other words, the court expressly holds that the organization of the company under the statute did not make it a public service corporation and that, although organized under that statute,

it could enter into private contracts that would be valid and binding.

The important question is: Was it at the time that the contract with the Fort Smith Spelter Company was entered into exercising the powers of a public utility, whether it had elected to operate as a public utility under the power conferred. We submit that the undisputed facts show that it was not a public utility at the time, and that it did not contemplate becoming one. As found by the Supreme Court the Clear Creek Oil & Gas Company was organized in July, 1914, and acquired something like 30,000 acres of leases on land and began exploring for gas. It did not however, bring in any gas wells until November, 1915, at which time it brought in one well, but as said by the Supreme Court of Arkansas in its opinion:

> "It had no market for its gas at that time and was seeking a market. Fort Smith and Van Buren, the only cities of any considerable size in that locality, were already being supplied by a gas distributor, which obtained gas from another field."

Certainly it did nothing up to this time to indicate that it intended to become a public utility. The fact is, as found by the Supreme Court, it had no market for gas and both the cities within its reach were already supplied by other gas companies, and it could not sell any gas in either Fort Smith or Van Buren and it had, in fact, been unable to sell any to any persons up to the time that it entered into this contract.

From November, 1915, the time it brought in its first well, until March 17, 1916, four months after it had been ready to sell gas and practically two years after its organization, it had not been able to sell any of its gas.

Buck and Kerr, who made the contract in controversy with the Clear Creek Oil & Gas Company, came to Fort Smith and after looking over the situation, decided that they did not want to locate at Fort Smith and went to Oklahoma. Then the representatives of the Clear Creek Oil & Gas Company called them over the telephone at Muskogee, asking them to consider the proposition of the Clear Creek Oil & Gas Company. They did this, because they had no market for their gas and this seemed to be the only chance to sell their gas.

They not only telephoned them, but finally went to Oklahoma and induced Kerr to come back with them to Fort Smith and enter into the contract for four cent gas. (Record, p. 89.)

It is admitted that the contract for four cent gas was the inducement to locate at Fort Smith, the inducement to make the expenditure of $300,000, and that without this contract, they would not have located at Fort Smith; and without this contract the Clear Creek Oil & Gas Company would have had no sale for its gas. It is conceded that at this time no pipe line had been purchased; nothing had been done in the way of exercising any power as a public utility; no gas had been sold; no purchaser had been found for the gas. No matter what the Clear Creek Oil & Gas Company might have contemplated at the time it secured its charter, at this time it was interested in selling its gas and made this private contract, and it is conclusively shown by the proof that it had no intention at that time of serving the public, but it knew that its only hope to market its gas was to secure private contracts with certain factories, which it proceeded to do. Not only do these facts show that it was not a public utility and did not contemplate becoming such, but it operated under these contracts for practically four years without even suggesting that it was a public utility.

The fact that it was not contemplated by either party that the Clear Creek Oil & Gas Company was or should become a public utility, is further shown by the fact that after operating under the contract for quite a while the Clear Creek Oil & Gas Company learned that it could sell its gas for a higher price, it then undertook to get the parties with whom it had contracted to pay a higher price for gas and when it failed to get an agreement abrogating the contract and get a higher price for its gas, it claimed that it had made a new contract with the Ft. Smith Spelter Company, by which it was to receive a greater price for its gas. There was no contention that it was a public utility; no contention that the contract was not valid when made; but the contention was that they had entered into another private contract, and so far from thinking it was a public utility the Clear Creek Oil & Gas Company itself, brought a suit to enforce what it alleged to be a private contract, modifying this contract. This suit was brought in the Chancery Court in Fort Smith, as we have

said, to compel a specific performance of a private contract for gas. The Fort Smith Spelter Company filed its petition and bond for removal to the United States District Court and said cause was removed and was, by the District Court, decided in favor of the Fort Smith Spelter Company. The contention of the Fort Smith Spelter Company in that case was that it had not entered into another contract, which modified the one now in controversy. After the decision against the Clear Creek Oil & Gas Company in the District Court, it appealed the case to the Circuit Court of Appeals and the case was decided on June 9, 1921, affirming the decision of the District Court, holding that the contract to modify the rate had not been entered into and was not binding. (Clear Creek Oil & Gas Company vs. Fort Smith Spelter Co., et al, 274 Fed. 906.)

During all this time it was never intimated by either party that the Clear Creek Oil & Gas Company was a public service corporation, but both parties treated the contract as binding and believed that it was binding. After it had operated under the contract for four years and sought to have the price modified and after the suit had been decided against it in the Federal District Court, at Fort Smith, the Clear Creek Oil & Gas Company filed its petition on the 17th day of March, 1920, with the Arkansas Corporation Commission, claiming that it was a public utility and that the price of gas was confiscatory and asking the commission to fix the price of gas. (Record, p. 3.)

We think that these facts conclusively show that at the time the contract was entered into the Clear Creek Oil & Gas Company was not a public service corporation and that neither party thought that it was or had any intention of ever becoming such. If it had been contemplated, as suggested by the Supreme Court of Arkansas, the Clear Creek Oil & Gas Company would not have sought to get the contract modified and would not have brought suit for specific performance of the other alleged private contract and would not have furnished gas for four years under the contract, as it claims, at a loss, before undertaking to get the price fixed by the regulatory body.

The Arkansas Supreme Court held that the Clear Creek Oil & Gas Company was not a public service corporation

because it was organized under a statute that permitted it to become such. Organization under the statute did not make it a public service utility. There is not a particle of evidence anywhere in the record tending to show that the Clear Creek Oil & Gas Company ever intended to become a public corporation, but the finding of the Supreme Court of Arkansas is based on a presumption that it would have to condemn right-of-way on the presumption that a private agreement as to right-of-way could not be made. But, even if the Clear Creek Oil & Gas Company contemplated becoming a public utility, still the contract for the sale of a certain portion of its gas not devoted to public use would certainly be valid and binding. It has been recently held that it is not what the charter says but it is what a corporation does that determines the character and that you judge from that whether or not it is a public corporation. What did the Clear Creek Oil & Gas Company do?—sold us gas at a certain price, representing that it had the gas to sell and the right to sell it, and it is found by the Arkansas Supreme Court that at that time it was not a public service corporation and we therefore contended that as to the gas sold to us it was not a public utility, even if it contemplated becoming such.

> "Although I have not been able to free my mind from doubt the court is of the opinion that this part of the business is not to be considered a public utility. Terminal Taxicab Co. v. Chas. W. Kutz, 241 U. S. 252."

In the above case the parties were operating a taxicab company carrying passengers; that was its whole business. It was a carrier, nothing else, but it entered into a private contract, and this court held that as to the contract it was not a public utility, and the court further said, speaking of the taxicab company:

> "It does business in the District, and the important thing is what it does, not what its charter says. The first item, amounting to about .35 of the whole, is done under a lease for years from the Washington Terminal Company, the owner of the Union Railroad Station in Washington, which we have mentioned as excluded from the definition of common carriers.
>
> "The next item of plaintiff's business, constituting

about one-fourth, in other contracts with hotels, by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonable to meet the needs of the hotels, receiving the exclusive right to solicit in and about the hotel, but limiting its service to guests of the hotel."

And the court further said:

"The decree so far as it asserts jurisdiction of the commission, is affirmed, but it must be modified so as to restrain any inquiry into the rates charged by the plaintiff at its garage, or exercise of jurisdiction over the same."

We want here to call the court's attention to a leading State case that we contend is absolutely on all fours with the case at bar. We refer to Allen vs. Railroad Commission of California, reported in 175 Pacific at page 466, and which case was, in effect, affirmed by this court when it denied the petition for writ of certiorari, (Railroad Com. vs. Allen, 249 U. S. 601, 63 Law Ed. 797.) This case is lengthy, however since the points involved are so similar to this present case we desire to call it to the particular attention of this court. In its opinion, among other things the court said:

"Manifestly the applicant did not become a public utility merely by itself fixing the rates and charges for the water which it sold, nor could its submission to the jurisdiction of the Railroad Commission and its declaration that it was a public utility, in the slightest affect the previously vested rights of these petitioners. * * *

"The character of these contracts evidenced by these water right certificates, the restriction upon transfer, the fixing of the acreage quantum, the enormous sum paid in the aggregate by these petitioners, for their water rights, establish beyond the need of further discussion that the parties to those contracts believed that they were dealing in their private capacities and selling and receiving water for private use. * * * *

"Upon this branch of the case then the conclusion then is inevitable that the applicant was not, as to all of its water and properties a public service corporation, and that these petitioners entered into their contracts with

applicant, both parties to each contract acting as of right in their private capacities.

"Then the second position adopted by respondents, as above outlined, is that this applicant is a public service corporation, without regard to the dedication of its property to public use, by virtue of the definition of such public service corporations found in our law. * * *

"It must in this be recognized that the constitution of this State and the legislature in pursuance of it, has undertaken to put out of existence any and all private rights in the matter of the rental or sale of water. So far as our constitution and laws are concerned the State has done this thing. There stands between it and its enforcement so far as this court is concerned, only the constitution of the United States, which, as the supreme law of the land, is whenever it speaks, the supreme law of the State."

And then after discussing what constitutes a public utility over which the State may exercise its regulatory control without regard to the private interests which may be thereby affected, the court proceeds as follows:

"Our Constitution and our statutory definitions above quoted therefore must be construed as applying only to such properties as have in fact been devoted to public use, and not as an effort to impress with a public use properties which have not been devoted thereto. For if the latter be the true construction of our constitution and statutes, then manifestly in their operation they are void wherever they unjustly interfere with private property or private contractural rights, by force of Article 1, Sec. 10, and of the 14th Amendment of the Constitution of the United States. If the first alternative be selected, then, for reasons already given, such parts of these properties as are affected by the contracts with these petitioners have not been devoted to public use and their private contractural rights must prevail.

"For these reasons the determination, conclusion and judgment of the commission that these petitioner's contractural and vested rights are subordinate to the

regulatory powers of the commission is in excess of the commission's jurisdiction, and therefore void, and in so far the decree of the commission is annulled."

THE CONTRACT BETWEEN FORT SMITH SPELTER COMPANY AND THE CLEAR CREEK OIL & GAS COMPANY WAS A VALID CONTRACT WHEN MADE AND ITS OBLIGATION WAS IMPAIRED BY THE ORDER OF THE COMMISSION AND THE CONSTRUCTION PUT UPON SAID ORDER BY THE SUPREME COURT OF ARKANSAS.

Our assignment of errors numbers 2 and 3 raises the question of the invalidity of the order of the corporation commission and the error of the Supreme Court in holding that the order was valid and the contract between parties invalid. The following facts are not disputed:

That the parties representing the Fort Smith Spelter Company had left Fort Smith, gone to Oklahoma after concluding that the situation at Fort Smith was such that they would not desire to locate there; that the Clear Creek Oil & Gas Company called them over the telephone and then went to Oklahoma and induced them to return to Fort Smith; that they offered them gas at four cents per thousand cubic feet and offered to enter into the contract now in controversy if the Ft. Smith Spelter Co., would build a smelter at Ft. Smith and agree to take from the Clear Creek Oil & Gas Co.; that the contract was then entered into in good faith by both parties; that at that time the Clear Creek Oil & Gas Company had never exercised any powers as a public service corporation; that by reason of the inducement offered by the Clear Creek Oil & Gas Company the Fort Smith Spelter Company located its plant at Fort Smith at an expense of approximately $300,000; that at the time the contract was entered into the Clear Creek Oil & Gas Company had no customers and no market for its gas; that both Fort Smith and Van Buren were being supplied from other gas fields by other companies; that the parties operated under this contract for a number of years without a suggestion from the Clear Creek Oil & Gas Company that it was a public service corporation or that the contracts were invalid; that when the price of gas went up the Clear Creek Oil & Gas Company began to make efforts to induce the Fort Smith Spelter Company to agree to pay a

higher price for gas; it was not contended that the contract was not binding but the Clear Creek Oil & Gas Company sought to get the Fort Smith Spelter Company to agree to increase the price. There was a conference at Fort Smith between the Clear Creek Oil & Gas Company representatives and the representatives of the Fort Smith Spelter Company and other manufacturing concerns with reference to the price of gas in the contract. It was thereafter contended by the Clear Creek Oil & Gas Company that a new contract had been entered into for an increased price for gas. The Fort Smith Spelter Company denied that any such agreement had been made; suit was brought and removed to the Federal District Court, and the question whether or not the new contract had been made, tried and determined in favor of the Fort Smith Spelter Company. The case was then taken to the Court of Appeals where this decision was affirmed. We take it that neither of the above statements can be disputed or will be denied by anyone.

In addition to the above statements the petition filed by the Clear Creek Oil & Gas Company on March 17, 1920, four years after the contract was made and entered into, makes the following statement:

> "The petitioner desired to bring industries to Ft. Smith and also to supply the existing industries therein with gas as fuel. The petitioner advertised for industries to come to Fort Smith and that it would furnish the same with gas for fuel and sought to establish industries at Fort Smith that would use gas as fuel. Resulting from said efforts was the procurement by the petitioner of the three respondents to establish industries to use gas as fuel to be furnished by the petitioner." (Record, p. 4.)

The petitioner then proceeds to discuss the contract, the time when it was made, terms, etc. The petition of the Clear Creek Oil & Gas Company further stated when speaking of the making of the contract:

> "At the time natural gas was plentiful in Oklahoma and sold cheaply. The petitioner in order to induce industries to come to Fort Smith had to make the price as low as the price prevailing in Oklahoma for the same, less than coal would cost as fuel." (Record, p. 6.)

The petition continuing, states the price of coal and the four cent per thousand cubic feet of gas was equivalent to a ton of mine-run coal. The petition further states that suit was brought and that an agreement was had and that the Fort Smith Spelter Company repudiated the agreement and then follows with this statement:

> "United States District Court in which said suit was tried directed a verdict against the petitioner on the ground that the agreement as shown in its testimony contemplated that the agreement should be in writing before it became effective and said decision left in force the original four cent rate per thousand cubic feet." (Record, p. 9.)

Then it states that the petitioner appealed from the decision and insisted a valid contract to pay eight cents had been made. (Record, p. 9.)

The Clear Creek Oil & Gas Company makes this other statement in its petition to the Arkansas Railroad Commission:

> "While this was an exceedingly advantageous price to the respondents, it was, in view of the competitive price in Oklahoma and the low price of coal as fuel, a reasonable rate and in view of the cost of producing gas it appeared it would be a compensatory rate, etc." (Record, p. 7.)

We therefore, have the Clear Creek Oil & Gas Company, itself, stating that at the time the contract was made that it induced the Fort Smith Spelter Company to enter into the contract and to spend its money; that the contract at that time was reasonable and compensatory; that afterwards, when suit was brought and tried in the Federal Court, the Clear Creek Oil & Gas Company did not contend that it was a public service corporation and that the contracts were for that reason invalid, but it contended that it had made an additional contract for eight cents for gas and that this additional contract was valid. If it had been a public service corporation or claiming to be such at that time it could have no more made the eight cent contract than it could the four cent contract. Not only does the statement made in the court, in which the above

mentioned case was tried, and the statements in its petition to the Arkansas Corporation Commission show that it did not contemplate becoming a public utility, but all of the acts of both parties seem to us to prove beyond question that no such thing was contemplated. As a matter of fact, it did not serve the public, because there was no public to serve. According to its own statement it was advertising for purchasers for its gas, was advertising for factories seeking to make contracts with them to furnish them gas, its object being, of course, to find a sale for its gas. And it now seeks to be relieved from these contracts, although it admits that it had no market for its gas; that it induced us to make the contract and to locate at Fort Smith; and admits that the contract was reasonable when made, and the Arkansas Supreme Court in construing our statute holds that it was at that time not a public service corporation. If at that time it contemplated becoming a public service corporation and avoid complying with its contracts all of its statements were erroneous and its entire conduct fraudulent and deceptive. But it appears from the evidence that it did not, at that time, contemplate becoming a public utility. If the contract was valid when made, then that its obligation is impaired, of course, will not be disputed.

> "Any enactment of a legislative character is said to impair the obligation of a contract which attempts to take from a party a right to which he is entitled by its terms or which deprives him of the means of enforcing such a right.
>
> "Law enacted subsequent to a contract, which, if valid, will have the effect of annulling the contract, constitutes the most palpable form of legislative impairment and such an enactment is clearly unconstitutional." Fidelity State Bank v. N. Y. Highway District, 31 A. L. R. 781.

The same question is raised in our assignment of error numbers 4, 5 and 7.

As to whether the contract in controversy is a valid and binding one and whether its obligations has been impaired, this court will determine for itself.

> "On the other hand, in deciding the constitutional

question presented, this court will determine for itself whether there is in fact a contract and, if so, the extent of its binding obligations."

Ga. Ry. & Power Co., vs. Decatur, decided by this Court June 4, 1923;

New Orleans Water Works vs. La. Sugar Ref. Co., 125 U. S. 18;

Bryan vs. Board of Education, 151 U. S. 639;

McGahey vs. Virginia, 135 U. S. 662;

Delmar vs. Merchants Mutual Ins. Co., 14 Wall. 661;

J. J. Douglas vs. Commonwealth of Ky., 168 U. S. 448.

"While it is true that upon a writ of error to a State Court we do not review findings of fact, nevertheless, two propositions are well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

Creswell vs. Knights of Pythias, 225 U. S. 261.

"When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal Court must examine the facts."

Frank vs. Magnum, 237 U. S. 347.

The above is found in the dissenting opinion, but it is a statement of the rule that has been many times approved by this Court.

"While it is true that upon a writ of error to a State Court we cannot review its decision upon pure question of fact, but only upon question of law bearing upon the Federal right set up by the unsuccessful party, it equally

is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

K. C. S. Ry. Co., vs. Albers Com. Co., 223 U. S. 591.

"The finding necessarily involves the decision of questions of law bearing upon the Federal right, such as the legal effect of evidence."

Id. p. 595.

"The uncontradicted testimony of witnesses likely to be informed on the subject disclosed the existence of an applicable lawful rate. True, this testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded.

"Such being the state of the evidence, the necessary conclusion, as a matter of law, is that an applicable and lawfully established local rate was in force on each road.

Id. p. 595.

In the present case, we have the parties entering into a contract, operating under it for three years, no intention on the part of the Clear Creek Oil & Gas Company to serve the public; therefore, no expectation on its part of becoming a public utility—and yet the only reason which the Arkansas Supreme Court gives for the statement that it anticipated or expected to become a public utility, was the presumption that it intended to do so because it was going to lay a pipe line, and the Court assumed, without evidence on which to base the assumption, that it would have to act as a public utility in order to condemn a right-of-way.

The entire pipe line might have been built without the exercise of the right of eminent domain, or without the Clear Creek Oil & Gas Company becoming a public utility. The pipe line cases, decided by this Court, show that some three hundred miles of pipe line were constructed under private arrangement, without the exercise of eminent domain. In the present case we have only twenty miles of pipe line. In the

pipe line case three hundred miles were constructed on the right-of-way of the Atchison, Topeka & Santa Fe Railway Company under agreement with that company and without exercising the power of eminent domain.

United States et al, vs. Ohio Oil Co., 234 U. S. 546.

We respectfully submit that if the Court was going to pass on the validity of contracts on presumption, it would have been fairer to presume that the pipe line could have been constructed by private agreement over the lands and by private agreement with the St. Louis, San Francisco Railroad Company on its bridge across the Arkansas river at Van Buren.

THIS IS A SUIT BROUGHT BY THE CLEAR CREEK OIL & GAS COMPANY TO BE RELEASED FROM THE BURDEN OF ITS UNDERTAKING AND THE PUBLIC IS IN NO WAY INTERESTED.

Even a public utility may make a binding contract from the burden of which a court will not relieve it, simply because it is burdensome. And this is all there is in this case. The public is in no way interested. The public was in no way interested and did not seek to have the Arkansas Corporation Commission fix the rate for gas. The Clear Creek Oil & Gas Company was not serving the public. It began and prosecuted this suit because it alleged that the price of gas was confiscatory and unreasonable in that it prevented the petitioner from developing its leases and thereby enabled its competitors to drain its lease holds, etc. (Record, p. 10) It is true, petition stated that said rates are an injustice to the public as well as to the petitioner in that they stifle the development of the field and the production of gas and prevent the public from having the benefit of a larger production of gas. (Record, p. 10.)

This is the only suggestion in the petition that the public is interested and it stated there it would have the benefit of a larger production of gas. The public was already being supplied by other companies and the rates to the public, subject to regulation by the Corporation Commission, and of course, the public was not in any way interested in this contract. The whole petition filed with the Arkansas Corporation Commission shows that the sole purpose of the Clear

Creek Oil & Gas Company was to be relieved from what it regarded and alleged as a burdensome contract; that it had not only voluntarily entered into, but had induced the other party to make it and to spend large sums of money on the strength of it. This court has said:

> "While the State may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts, there is quite clearly no principle which imposes an obligation to do so merely to relieve the contracting party from the burden of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield, but it is not an independent legislative function to abolish or set aside such contracts, however, unwise or unprofitable they may be. And the exertion of legislative power solely to that end is precluded by the contract impairment clause of the Constitution. The power does not exist per se. It is the intervention of the public interest which justifies and at the same time conditions its exercise."
>
> Ark. Nat. Gas Co., vs. Ark. Railroad Commission, 261 U. S. 379 (67 L. Ed. 705.)

There are two reasons why the public is in no way interested, and has never been interested in this case. The first is that, as the record shows, there was no public to serve—the public was already being served by other concerns. And the second is that the Clear Creek Oil & Gas Company wanted to sell to large concerns, as smelters and glass factories, because it was much less trouble and expense to serve large concerns as they took gas constantly, not only day and night but throughout the entire year, and was therefore, more profitable to gas producers to sell to such persons, and for this reason they preferred to make private contracts with concerns that were users of great quantities of gas. The record shows that they contracted to furnish the Fort Smith Spelter Company twelve million cubic feet a day, this was all the gas they had at that time, and there was no certainty that it would ever have any more. To be sure, it expected to get more gas and with the idea that it would get more, it made other private contracts with other large smelters, but it did

not expect to sell to the public. How it could be thought that the public was in any way interested, or that the Clear Creek Oil & Gas Company contemplated becoming a public utility when it had sold us all the gas it had, we are unable to see. One of the clauses in the contract is as follows:

> "WHEREAS, one of the inducements for the location of said plant upon said lands is the procurement of natural gas from the said first party during the life of the field; and the said first party desires to sell, and the second party desires to purchase, a supply of natural gas for the use in and about the construction, operation and maintenance of said smelting plant, or for other future manufacturing uses of said parties of the second part. It is therefore agreed," etc. (Record, p. 24.)

Here we have the statement that the inducement to locate the smelter there is this contract, and in this we have a sale by the Clear Creek Oil & Gas Company of all the gas it owned. And of course, it could not have anticipated or contemplated becoming a public utility.

Respectfully submitted,

JAS. SEABORN HOLT
JAS. W. MEHAFFY
TOM M. MEHAFFY
Attorneys for Plaintiff in Error

No. [redacted] 2876

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

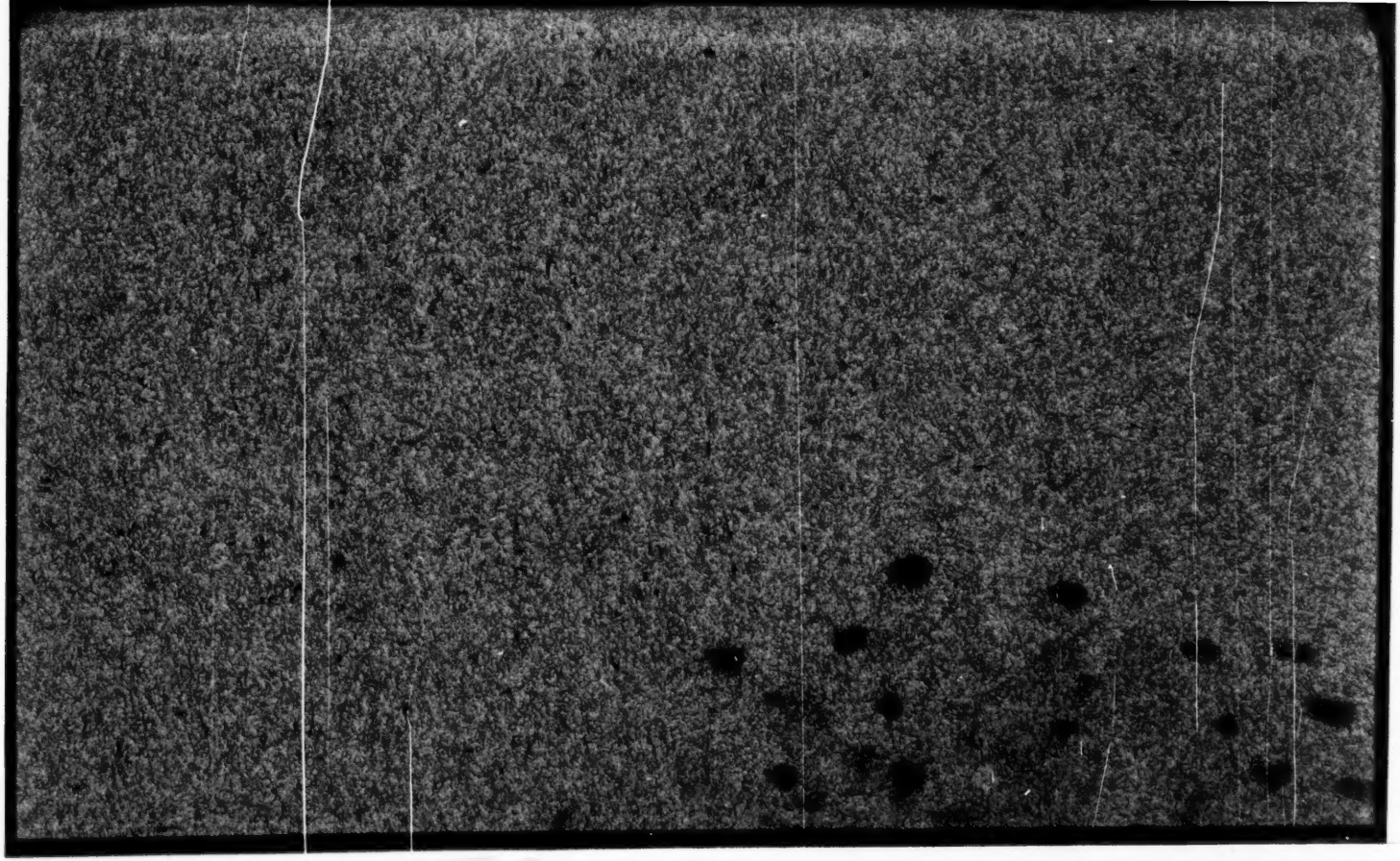
FORT SMITH SPELTER COMPANY,
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY,
DEFENDANT IN ERROR.

ERROR TO [redacted] CIRCUIT COURT OF APPEALS
AND [redacted] CIRCUIT

[redacted]
[redacted]
Attorneys for [redacted]



No. 774

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

FORT SMITH SPELTER COMPANY,
PLAINTIFF IN ERROR,

vs.

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INDEX

	Page
Motion to Dismiss Writ of Error	Preface
Statement	3- 9
Argument	9-15

CITATIONS

	Page
Crawford & Moses' Digest, Sec. 3969	5
Act 571 of April 1, 1919	7
Clear Creek Oil & Gas Co. vs. Fort Smith Spelter Company, 148 Ark., 260	10, 11, 12, 13
Waters-Pierce Oil Co. vs. State of Texas, 212 U. S. 86	13
Quimby vs. Boyd, 128 U. S. 488	14
Dower vs. Richards, 151 U. S. 658	14

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MOTION TO DISMISS WRIT OF ERROR

Comes the defendant in error and moves to dismiss the writ of error and for cause thereof states:

There is drawn in question here the validity of no statute of the State, merely an attack on the exercise by the Corporation Commission under an unassailed statute of the power of regulation of the rates of the defendant in error on the ground that the defendant in error was not at the time it made a contract fixing rates with the plaintiff in error a public service corporation, or contemplated becoming such when the contract was made.

The only question presented is one of fact, whether the defendant in error was in fact a public service corporation when it entered into the contract in question or both parties thereto contemplated that it would operate as a public service corporation when they made the contract in question.

The Supreme Court of Arkansas decided after sustaining all contentions of the plaintiff in error as to the law governing the case that the facts "Indisputably stamp these contracts as being made in contemplation of the entrance of the appellant upon the operation of a business which was public in its character and was intended as a preferential right against the public."

There is no assignment of error that there was no evidence to sustain such finding, merely assignments to the effect that the Court erred therein, which assignments do not present a question for review here.

WHEREFORE, defendant in error prays the dismissal of the writ of error.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Defendant in Error.

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STATEMENT

The Clear Creek Oil & Gas Company was organized as a corporation on the 25th of July, 1914, for the following purposes, among others, to-wit:

For the purpose of sinking wells, boring for, providing and transporting crude oil and natural gas, coal, asphalt or any other minerals which may be found in the development of their property (R. pp. 20-23).

In November, 1915, it brought in a gas well in Crawford county producing about twelve million cubic feet per day. It then had under lease about 25,000 or 30,000 acres of land. At that time Fort Smith and vicinity was being supplied with natural gas for domestic and commercial purposes from other fields and the first action of the Company after bringing in said well was to secure customers for its gas (R. pp. 29-31).

The first contract entered into was with Buck and Kerr, which was subsequently assigned to the plaintiff in error. This was a conditional contract for the location of a smelter and furnishing gas to said smelter, at the price of 4c per thou-

sand cubic feet and giving said Kerr and Buck, or their assigns, the preferential right to the first call upon the gas produced by the defendant in error (R. pp. 31-32). The contract is set out at pages 23-29 and is dated March 17, 1916.

The condition of the contract was securing a satisfactory site with switches and tracks without cost to Kerr and Buck. This location was to be donated by the Business Men's Club of Fort Smith, and the factory was located at South Fort Smith (R. p. 31).

Prior to entering into this contract on February 7, 1916, the defendant in error obtained a franchise from the town of Alma; on March 2, 1916, from the town of Conway; and on March 14, 1916, from the town of Clarksville (R. p. 33). The company did not operate under any of these franchises.

Subsequent to that contract, to-wit: on the 25th of March, 1916, it obtained a franchise from the city of Van Buren, which is set out at Record pages 134-137, and on April 3, 1916, obtained a similar franchise from the city of Fort Smith, which is set out at Record pages 132-134.

On the 5th day of April, 1916, pursuant to a petition filed therein about sixty days prior thereto (R. p. 48) the County Court of Crawford County gave the defendant in error permission to lay and maintain its pipe lines along certain public highways in Crawford County and required said company to lay all pipe lines not less than 16 inches below grade and on the south side of the public roads, and other regulatory provisions (R. pp. 130-131). Before the company laid its pipe line it got a similar order from the County Court of Sebastian County (R. pp. 99-100).

This was under Act of May 2, 1905, reading as follows:

"Pipe Lines—Right-of-Way. Any corporation organized by virtue of the laws of this State, for the purpose of developing and producing mineral oil, or petroleum, or natural gas in this State, and marketing the same, or transporting or conveying the same by means of pipes from the point of production to any other point, either to refine or to market such oil, or to conduct such gas to any point or points to be used for heat or lights, may construct, operate, and maintain a line or lines of pipes for that purpose along and under the public highways and the streets of cities and towns, with the consent of the authorities thereof, or across and under the waters and over any lands of the State and on the lands

of individuals, and along, under, or parallel with the rights-of-way of railroads, and the turnpikes of this State; provided, that the ordinary use of such highways, turnpikes, and railroad rights-of-way be not obstructed thereby, or the navigation of any waters impeded, and that just compensation be paid to the owners of such lands, railroad rights-of-way, or turnpike, by reason of the occupation of such lands, railroad rights-of-way, or turnpikes, by said pipe line or lines." Crawford & Moses' Digest, Sec. 3969.

The contract (R. pp. 23-29) recited that the defendant in error had a lease on about 30,000 acres of land and that it intended and agreed to procure for use under the contract other lands in addition to those (R. p. 24).

It provided and the contract gave notice to third parties that the second parties (Buck and Kerr) shall have the first call upon the gas supply of the company now being, or which may hereafter be obtained from any of the counties mentioned in the contract or other territory which may be acquired by the company and the right of Kerr and Buck is prior and superior to any contract or agreement made, or which may be made by the company for the furnishing of gas to others from said territory (R. p. 27).

The contract was to remain in force as long as gas in sufficient quantities to comply with the terms of the contract can be produced from the territory mentioned, or which may thereafter be held or controlled by the company (R. p. 28).

It was further agreed that should the company ever sell or make contracts to consumers or others, except churches, schools, hospitals or charitable institutions, at a less rate of price than governing this contract, then in such event the second parties should pay for all gas consumed at a price equal to such lower price, or prices, during the entire time they are in effect (R. p. 25).

The day after this contract was made, to-wit: on March 18, 1916, the defendant in error entered into a Memoranda Agreement with a company represented by E. G. Hothorn. This was supplemented by another contract of March 21, 1916, and these in turn by a formal contract dated May 3, 1916 (R. pp. 119-121).

This contract was for the establishment of a smelter east of Van Buren between Van Buren and the gas field, and was subject to the first call upon gas under the Kerr and Buck contract and gave it prior call to all others (R. p. 127).

This formal contract provided for the advancement by the parties thereto (L. Vogelstein & Company) of $45,000.00 for the construction of a pipe-line by the company, to be repaid in gas (R. p. 34).

The contract of L. Vogelstein & Company in the 6th Article required the company to build a 10-inch pipe line and a 3-inch line would have been sufficient to supply that smelter (R. p. 70).

This contract expressly provided that it was subject to the Kerr and Buck contract and that all subsequent sales of gas or contracts for such sale should be subject to the terms of this contract and was not subject to the terms of any other contract, or contracts, which might be entered into (R. p. 69).

The next contract the company entered into was with Charles T. Orr under which another smelter was erected. This was in November, 1916 (R. p. 35).

It also entered into a contract to supply gas to two glass factories (R. p. 36).

The company gathered other industries on its lines and in all had nineteen industries which it was supplying with gas in and about the city of Fort Smith and South Fort Smith, including the smelter east of Van Buren (R. p. 36).

The company took on domestic customers in South Fort Smith—about 160 of them (R. p. 6).

The pipe line ran from the field west to Van Buren, through the city of Van Buren south to the city of Fort Smith and through it to South Fort Smith, and cost $165,000.00 and a distance of about 18 or 20 miles (R. pp. 50-51), and had a capacity of twelve million cubic feet of gas per day (R. pp. 76-77).

The company developed additional wells in the Kibler field in Crawford County, and in November, 1916, had ten producing wells (R. p. 36). It continued to develop until 1918, when it had to stop for the want of funds (R. pp 36-37). When a shortage of gas occurred the company attempted to get the price raised and failed to do so, and, having no money to drill for gas, turned off its customers pursuant to the various contract requirements (R. pp. 38 39), and the customers then began to get injunctions against it; then the Fuel Administration came into being and for a time abrogated all priorities and established its own priori

ties. The injunction suits were left standing, and after the Fuel Administration expired went to trial which resulted in the compromise which was not consummated (R. pp.38-41)

At the time these contracts were entered into there was no regulatory body in Arkansas which had jurisdiction over public utilities outside of cities and towns, other than railroads.

The General Assembly of 1919 passed Act No. 571, which was approved April 1, 1919, which created a Corporation Commission and gave it jurisdiction, among other things, over:

(b) "Telegraph and telephone companies and pipe line companies for the transportation of oil, gas and water.

(c) "All gas companies, electric lighting companies, including improvement districts and municipalities furnishing gas or electricity for lighting, heating or power purposes."

Section 8 of said Act was as follows:

"Commission authorized to Establish Rates. The Commission shall have the power, after reasonable notice and after full and complete hearing, to enforce, originate, and establish, modify, change, adjust and promulgate tariffs, rates, joint rates, tolls and schedules for all public service corporations; and whenever the Commission shall, after notice and hearing, find any existing rates, tolls, tariff, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of the law, the Commission shall, by an order fix reasonable rates, joint rates, tariffs, tolls, charges or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory, inadequate or otherwise in violation of any of the provisions of this law."

The defendant in error filed its petition before the Corporation Commission on March 17, 1920, praying it to establish and enforce a rate on natural gas for smelters; this petition is found on pages 3 to 11 of the Record. It recited the purposes of the corporation, a history of the development of the gas field in Crawford County, and of securing three smelters to come to Fort Smith under contracts by the terms of which it gave the Fort Smith Spelter Company the first call on the gas, L. Vogelstein & Company the second

call, and the Athletic Smelter (C. T. Orr) the third call, and that it entered into contract with two glass companies, giving them respectively the fourth and fifth calls upon their gas and setting forth the daily consumption of each. Then it set forth its financial situation and the cost of its pipe line; and that

when its supply of gas declined in 1918 to such extent it could not furnish gas to all of its five contract customers and to its other customers it began cutting off all of its nineteen industries, as well as its domestic customers in the Kibler field and South Fort Smith; it had a total of 160 customers in said places.

Then it set forth facts showing that the 4c contracts were unremunerative and that the actual cost of producing gas largely exceeded said price and set forth fully the preferential character of the contracts which it had made.

It set forth that the rate was unreasonable in that it prevented the petitioner from developing its leases and enabled its competitors to drain its leaseholds of gas to the injustice of the lessors, as well as itself, and set forth that the rate was discriminatory, preventing the petitioner from selling its gas to other industries that were seeking to use it and that it is an injustice to the public as it stifled development of the field and prevents the public from having the benefit of a larger production from the field, and prayed for the establishment of a 10c rate to the smelters and asked it to make proper orders to establish rates.

Pursuant to this the Commission, after an extended hearing, established a sliding scale of rates, as follows:

First 300M cubic feet, 15c per M.
Next 300M cubic feet, 13c per M.
Next 2400M cubic feet, 10c per M.
All over 3000M cubic feet, 9c per M (R. p. 139).

This meant that the cost of the gas for the amount consumed by the plaintiff in error was a small fraction over 9c per thousand cubic feet; it was further developed in the hearing before the Commission that the cost of producing and delivering gas to the smelters was at no time during the time that gas was furnished to them less than 6c per thousand cubic feet, and the cost thereof ran to as high as 8c per thousand cubic feet, and that the Arkansas Zinc & Smelting Corporation at Van Buren after the first year of

operation paid the Twin City Pipe Line Company (a competitor of the defendant in error) the sum of 9c per thousand cubic feet for two-thirds of its supply of gas, and the testimony of all witnesses indicated that the price of gas at South Fort Smith, where the plaintiff in error is located, should be 2c more than the price of gas at Van Buren (R. pp. 1-2).

The plaintiff in error carried this case to the Pulaski Circuit Court, which was the tribunal under Section 27 of Act 571, in which to contest the findings of the Corporation Commission.

The Circuit Court dismissed the petition, thereby reversing the action of the Corporation Commission. The defendant in error appealed to the Supreme Court of Arkansas and it reversed the Pulaski Circuit Court. The opinion therein is found at page 152 of the Record.

As the Pulaski Circuit Court had not tried the case upon the merits, it was remanded there for trial. On the second trial the Court held that the opinion of the Supreme Court had bound it to sustain the action of the Corporation Commission and did so and the plaintiff in error appealed from that decision and the Supreme Court reversed that decision, holding that the Court should determine the rates on the evidence which had been heard before the Corporation Commission (R. pp. 160-162).

On the remand to the Pulaski Circuit Court it was again tried and the Court established a 7c rate in lieu of the rates established by the Corporation Commission.

Both parties appealed from that decision and the Supreme Court again reversed the Pulaski Circuit Court and found that the rates established by the Corporation Commission were sustained by the evidence and again sent the case back to the Pulaski Circuit Court to put in force the rates of the Corporation Commission (R. pp. 163-166).

The plaintiff in error obtained a writ of error to review the decisions of the Supreme Court of Arkansas, and it is that writ of error which we are now seeking to dismiss.

ARGUMENT

An examination of the decision of this case in 148 Ark. 260 shows the issues presented and decided by the Supreme Court. This decision was from the ruling of the Pulaski Cir-

cuit Court dismissing the petition, thereby vacating the order of the Corporation Commission. On behalf of the defendant in error, who was the appellant in that case, it was contended by this defendant in error that the "Appellant was a public service corporation from the beginning, and all these parties dealt with it as such, subject to the rights of the State to regulate the rates made by it." (148 Ark., p. 261.)

It was then argued that condemnation proceedings could not be had in favor of private use under the Arkansas decisions and that the right of taking property by eminent domain had been conferred upon pipe line companies.

Next it was contended that if the appellant was not a public service corporation at the time it made the contracts in question, it was at the time the Corporation Commission made the order regulating the rates in lieu of the contract rates, and the appellant relied upon the decision of this Court in Producers' Transportation Co. vs. Railroad Commission of California, 251 U. S. 228, to sustain that proposition (p. 262).

The plaintiff in error, who was the appellee then, contended: "The Clear Creek Company was not a public service corporation at the time of the execution of the contracts."

It next contended that the contracts between the smelters and the company were purely private contracts and not subject to control and the order of the Commission was a legislative act prohibited by the Federal and State Constitutions.

It next contended "If the Clear Creek Company was a public service corporation when we contracted with them, the State had the right to regulate it, and the State had no power to impair the obligation of a contract between purely private parties."

It next contended "The findings of the Circuit Court on conflicting evidence are very persuasive at least," and that "the findings are not against the clear preponderance of the evidence and should be sustained." (148 Ark., p. 262.)

Chief Justice McCulloch rendered the opinion of the majority and a concurring opinion was filed by Justices Humphreys and Wood.

It is interesting to note the point of the concurring opinion. The minority Judges regarded it as extremely

doubtful if the power existed in appellant corporation to elect as between its private and public status, and that such election had been made at the time the contracts were entered into; that at the time of the contracts the franchises had not been granted to furnish gas to the general public in the nearby cities of Van Buren and Fort Smith, and the appellant did not possess a pipe line and had not attempted to exercise the right of eminent domain to acquire a right-of-way.

They further state that the contracts on their face contain preferential clauses which point unerringly to the fact that it was in the minds of the parties that appellant corporation was at the time a private corporation.

These judges, however, held that the character of business conducted by the appellant was subject to regulation by the State, and, being subject to such regulation, the State might at any time convert such a corporation into a public utility by conferring upon it the power to exercise the right of eminent domain, and that such right could not be conferred upon a private corporation. So the very act of conferring the right of eminent domain upon a private corporation, organized for the purpose of developing and marketing natural gas converted it, *eo instanti*, into a public corporation. They held that the power to exercise the right of eminent domain, and not the exercise thereof, is the mark which stamps its character upon it.

They interpreted the statute as making the appellant a public utility by virtue of the law at the time it entered into the contracts, as it appeared from the undisputed evidence that it was organized for the purpose of producing and marketing natural gas in the State.

The majority of the Court, however, did not take this view. The Chief Justice thus stated the point of the decision as follows:

> "The real point of the controversy between the parties is whether the contracts between appellant and appellees for the sale and purchase of gas were executed by appllant when it was not acting in any public capacity, as contended by appellee, or whether appellant was from the start a public service corporation and the contracts attempted to confer preferential rights to appellees as consumers. Learned counsel for appellees candidly concede that, if appellant was organized as a pub-

lic service corporation and at the time of the execution of these contracts it was operating as such public utility in the production and distribution of gas, the contracts were void, so far as they undertook to confer special privileges upon appellees, and that the schedule of rates for prices of gas is subject to control by the Corporation Commission, even though the statute authorizing such regulations was not passed until after the contracts were executed."

Again the Court stated the law which they applied, as follows:

> "If appellant was not a public utility at the time these contracts with appellees were entered into and the contracts were not entered into in anticipation of appellant becoming such a public utility, but were merely private undertakings concerning a subject-matter over which the State had no control, then such contracts were valid, and the obligations thereof could not be impaired by any State regulation. Neither could appellant impair the obligations of its own contract valid at the time of its execution by subsequently engaging in the operation of business subject to the State control. To permit that would be to allow the impairment of the contract by indirection, which could not be directly done. We are not aware of any authorities holding to the contrary on this proposition, and we deem it unnecessary to cite any authorities in support of it."

The Court then took up the pipe line Act of 1905 and the construction which this Court placed upon a similar Act in California in Producers' Transportation Company case, 251 U. S. 228, and held "that the appellant did not become a public utility merely by force of the statute itself, without anything being done pursuant to the terms of that statute or in any other respect to make itself a public utility", but stated: "The conclusion is inevitable from the proper construction of the statute that, if a corporation organized for the purposes of carrying on the business mentioned in the statute takes advantage of the terms of the statute, it becomes a public utility subject to the State's control."

The Court then reviewed the evidence and held that the evidence showed that the appellant had not exercised the right of eminent domain under the statute for the purpose of obtaining a right-of-way when it made the contract, "But the evidence is entirely convincing that it was making prep-

arations to do so, and these contracts on their face, and especially in the light of the testimony adduced with respect to the attitude of the parties at that time, necessarily contemplated the exercise of the right of eminent domain by appellant in equipping itself for the performance of the contracts. The gas field was about twenty miles from the place where the gas was to be delivered to the parties under these contracts. The only available means of transportation was, of course, by pipe lines running from the field to the point of delivery, and this pipe line necessarily would cross railroads and public highways and would cross the Arkansas River. Even if it be conceded that it was within the range of possibility to find some other means of transporting the gas from the field to the point of delivery without condemning a way over private property and without the granting of permits to use the public highways, it certainly was not practicable or reasonable. Nor was it reasonable to expect that the parties had in contemplation some such extraordinary means of transportation. The only reasonable conclusion is that the parties, when they contracted for delivery, meant that it was to be done by a pipe line which was to be constructed in the exercise of the right of eminent domain over private property in case private grants could not be obtained, and over and along the public highways of the county. It is, therefore, certain that these contracts, though executed before appellant began operating as a public utility, were made in contemplation of such operations by appellant and were intended as preferential contracts extended to the appellees in priority of any rights of the public."

The Court reviewed further facts in evidence, such as the size of the pipe line and stated finally that the facts indisputably stamped these contracts as being made in contemplation of the entrance of the appellant upon the operation of a business which was public in its character and was intended as a preferential right against the public.

It is a significant fact that the plaintiff in error, who was the appellee in this case, sought to sustain the decision of the Circuit Court on the theory that there were conflicting facts and its finding was controlling.

The following quotation from Waters-Pierce Oil Co. vs. State of Texas, 212 U. S. 86, is applicable here:

"The case was submitted upon oral arguments and elaborate briefs and a voluminous record. It was argued, in many aspects, as though this were a proceeding in error to review the weight of the evidence adduced in the State Courts, to re-examine the rulings of the Court upon the admissibility of testimony, and to determine the effect of the statute of limitations in the State.

"The jurisdiction of this Court to review the proceedings of the State Courts, as we have had frequent occasion to declare, is not that of a general reviewing Court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or State statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in the State Court, and denied by the rulings and judgment of that Court. U. S. Rev. Stat., Par. 709, U. S. Comp. Stat. 1901, p. 575.

"Nor does this Court sit to review the finding of facts made in the State Court, but accepts the findings of the Court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court," citing many cases.

In Quimby vs. Boyd, 128 U. S. 488, the Court ruled as stated in the syllabus: "Alleged errors of the State Court which involve questions either of fact or of State, and not of federal law, are not reviewable here on writ of error."

In Dower vs. Richards, 151 U. S. 658, the Court said:

"The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision in matter of fact was erroneous, and contrary to the weight of the evidence in the case. But to review the decision of the State Court upon the question of fact is not within the jurisdiction of this Court.

In the legislation of Congress, from the foundation of the Government, a writ of error, which brings up matter of law only, has always been distinguished from an appeal, which, unless expressly restricted, brings up both law and fact", citing many cases.

There being nothing but a question of fact to review here,

and that fact determined upon what the plaintiff in error has alleged to be conflicting evidence, certainly there is no Federal question for review here and the writ of error should be dismissed.

Respectfully submitted,

JOSEPH M. HILL,

HENRY L. FITZHUGH,

Attorneys for Defendant in Error.

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JUN 2 1924
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IN THE

Supreme Court of the United States

October Term, 1923

FORT SMITH SPELTER COMPANY,
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY,
DEFENDANT IN ERROR

BRIEF IN REPLY ON MOTION TO DISMISS WRIT

JOSEPH M. HILL,
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[redacted] PRINTING CO., FT. SMITH, ARK.

No. 774

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

FORT SMITH SPELTER COMPANY,
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY,
DEFENDANT IN ERROR

INDEX

		Page
ERRORS OF FACT—		
(a)	As to "Undisputed Evidence"	3-5
(b)	As to Exercise of Eminent Domain	5-6
(c)	Pipeline for a Public Utility	7
(d)	The Contract Not Subject to Regulation	7
(e)	The Public Served	7-8
(f)	The Assignment of Errors	8
(g)	The Conflict in Evidence	8-9

CITATIONS

	Page
Clear Creek Oil & Gas Company vs. Fort Smith Spelter Company, 148 Ark. 260	7-8

No. 774

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OCTOBER TERM, 1923

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DEFENDANT IN ERROR

BRIEF IN REPLY

Errors of Fact

This reply is only written to correct some errors of fact in the brief of the plaintiff in error.

(a) On page 2 in the Response, the over-zeal of counsel leads them to state: "The undisputed proof in this case shows that the Clear Creek Oil & Gas Company was not a public utility at the time the contracts were made, and the questions presented here are therefore not questions of fact, but questions of law." At page 4 it is said: "An examination of the record and decisions of the Court will conclusively show that at the time the contract was entered into neither party thought the company a public utility." Again at page 10 counsel say that the parties entered into the contract and operated under it for three years and there was no intention on the part of the Clear Creek Oil & Gas Company to serve the public, etc.

These statements and others of like import require looking back to the actual status of the parties at the time the contract was made.

The discovery of gas was made in November, 1915, and this contract was made on March 17, 1916; in that interval

the company had obtained a franchise to operate as a public utility in the nearby town of Alma on February 7th and in the city of Conway on March 2nd, and the city of Clarksville on March 14th (R. p. 33). McGehee, president of the company, testified that the newspapers were full of accounts of these franchises (R. p. 67).

It had also filed a petition with the county court of Crawford County to use the highways of that county for a pipe line (an exercise of the right of eminent domain under the statute), which petition was pending and had been for thirty-odd days prior to the contract, and was granted on April 5th—eighteen days after the contract was made (R. p. 48).

Mr. Robertson, secretary-treasurer of the company, who had charge of these matters, testified that the company commenced figuring in January on the pipe line, and the order was placed in the early part of March for a 10-inch pipe line, which was afterward laid. That the order for the 10-inch pipe line had been made prior to the contract of March 17th with the plaintiff in error, and that Kerr and Buck, the contracting parties, knew it, and that they would not have built the plant unless they had known that the company was going to build a pipe line, and the officers went over fully with them that it was a 10-inch pipe line (R. p. 99).

The testimony is that a 10-inch pipe line delivers, at a 5-pound pressure, 14,908,000 cubic feet of gas each 24 hours (R. p. 76). The maximum consumption of the plaintiff in error was 3,800,000 cubic feet of gas per day (R. p. 57).

The contract itself calls for a maximum of 5,000,000 feet per day, with the right, if the plant was increased, that that quantity, on 120 days' notice, might be increased to 12,000,000 (R. p. 26).

It was undisputed, however, that the plant was never increased and while there was a 5,000,000 maximum, 3,800,000 was the actual maximum taken. Therefore the parties knew when they made this contract that it was to be delivered to them through a 10-inch pipe line and they would take less than one-third of its capacity.

Just one week after the contract was made (R. pp. 134-137) the city of Van Buren passed an ordinance granting the company a franchise as a public utility, under which the streets of that city were used for the pipe line to convey the gas to the plaintiff in error.

Just two weeks after the contract was made, on April 2nd, the city of Fort Smith granted a similar franchise, under which the company used the streets of the city to reach the plant of the plaintiff in error in South Fort Smith. These franchises are in the record at pages 132-138, and show this company was vested with full rights of a public utility, granted the use of the streets, its rates were regulated, a franchise tax was established, and other regulatory provisions usually found in the operation of public utilities in cities.

While these franchises were granted a short time after the contract was made, yet necessarily they were in contemplation and doubtless were pending before the councils prior to the time this contract was made; at any rate they were granted and utilized by the company before the plaintiff in error ever spent one cent towards the erection of its plant under its contract. Therefore it is apparent there is no basis for the counsels' statement that the undisputed testimony shows that this company was not a public utility at the time it entered into this contract, and hence this matter can not be determined as a question of law on the assumption that it was not a public utility at that time. The Supreme Court of Arkansas has found upon some of the facts which we have here presented and many others which are in the record that it was a utility as a matter of fact at that time and that it was in contemplation of both parties that it would so operate.

(b) At page 11 counsel question the statement of the Supreme Court of Arkansas that the evidence was convincing that the company was making preparations to exercise the right of eminent domain and the contracts on their face and in the light of the testimony adduced necessarily contemplated the exercise of the right of eminent domain, and charge that the Court makes that statement on a presump-

tion that as the gas field was about twenty miles from the place where the gas was to be delivered, and that the only means of transportation was by pipe line, which would have to cross railroads, public roads and the Arkansas River, that it was unreasonable to assume that it would be constructed any other way, and they argue that the conclusion of the Court on this subject is based on the presumption that private agreements could not be had by which the pipe line could be constructed, and state there is not a particle of evidence that they could or could not make private arrangements.

In the light of the fact that the company had pending in the Crawford County Court an application for the use of the public roads of Crawford County and that it had already acquired franchises in three towns—one of them a few miles from the gas field—and shortly thereafter acquired franchises in Van Buren and Fort Smith for the use of their streets upon which to lay the pipe line, it is not fair to say that any of these conclusions are based on presumption; they are merely based on the existing facts.

Another matter which prevents any presumptions being indulged in that the company could have made private arrangements for the pipe line company is this: The testimony develops the physical situation of the field in relation to the cities of Van Buren and Fort Smith and the suburb of South Fort Smith. It is shown that the gas field is about six or seven miles east of Van Buren and that the pipe line went through the streets of the city of Van Buren under its franchises, and over a public bridge of the Arkansas River, between Fort Smith and Van Buren, thence through the city of Fort Smith and south to a suburb beyond it—South Fort Smith—over one-half of the length of the pipe line being in the two cities of Van Buren and Fort Smith.

It is unreasonable to assume that it could have gotten private rights-of-way through the city streets or over the residence lots of these cities; necessarily when more than one-half of its length was in these two cities it would have to be built in the streets and alleys, and that could only be done under franchises to it as a public utility.

(c) At page 12 it is stated that the pipeline was not laid for transportation of gas as a common carrier, but that the charter itself shows the line was for the purpose of transporting its own gas. Certainly it can transport its own gas as a public utility as well as other peoples' gas. It is the right to use the highways, streets and alleys as a public utility, not the ownership of the gas, which fixes its character. Again, it is stated at that page it has been repeatedly held that it is not what the charter says, but it is what the corporation does that determines its character. Applying this sound test here and it is found that this company as soon as it could possibly get started operated wholly as a public utility, obtaining its franchise for its right-of-way from the Crawford and Sebastian County Courts and from the two cities, through which its pipe line was constructed.

(d) Again, at page 13, it is contended that even if the company became a public service corporation, thereby giving the Corporation Commission jurisdiction over its rates, that this would not apply to a private contract previously made for the sale of gas, which it had a right to sell. This is a contention different from the one made by the plaintiff in error in the Supreme Court of Arkansas. In the statement of the case by the Chief Justice, page 264 of 148 Arkansas Report, he said:

> "Learned counsel for appellees candidly concede that, if appellant was organized as a public service corporation and at the time of the execution of these contracts it was operating as such public utility in the production and distribution of gas, the contracts were void, so far as they undertook to confer special privileges upon appellees, and that the schedule of rates for prices of gas is subject to control by the Corporation Commission, even though the statute authorizing such regulations was not passed until after the contracts were executed."

(e) At page 14 it is argued that the public is not interested in this issue and has never been interested in it, because: First, that there was no public for it to serve, the public was already being served by other concerns. Second, that the company wanted to sell to large concerns, such as smelters and glass factories.

The difficulty about that argument is that it does not square with the facts. The record shows the company did serve as soon as it got into operation nineteen industries and 160 domestic customers, in addition to its five contract customers.

(f) At page 16 it is stated that the assignment of errors raises the question that there was no evidence to support the finding of the Supreme Court. Unfortunately for the plaintiff in error the assignment of errors is copied in its brief and is set out at pages 7 and 8; as heretofore stated as to these matters of fact it does not charge that there was no evidence to sustain the findings of the Supreme Court of Arkansas, it merely charges that the Supreme Court of Arkansas erred in holding and deciding thus and so.

(g) Finally the counsel dispute the statement which was made in our first brief that the plaintiff in error contended in the Supreme Court of Arkansas that there was a conflict in the evidence, alleging that we were in error in making that statement.

They say there was never any conflict in evidence as to the validity of their contract, or as to the Clear Creek Oil & Gas Company being a public utility and allege that there was a conflict in evidence as to the reasonable price of gas and nothing more.

The case went to the Supreme Court of Arkansas from a judgment of the Pulaski Circuit Court dismissing the petition, which was the petition filed before the Corporation Commission for the fixation of rates, and which had been appealed by the plaintiff in error to the Pulaski Circuit Court.

We again call your attention to the contentions made by the plaintiff in error, page 262, of 148 Arkansas Report, summarized as follows:

> "The findings of the Circuit Court on conflicting evidence are very persuasive at least. 125 Ark. 138. The findings are not against the clear preponderance of the evidence and should be sustained. 120 Id. 118."

There could not have been any conflict in the evidence on the fixation of rates referred to in their argument, because the case had been dismissed and necessarily this statement refers to their contentions that the evidence was conflicting as to whether or not the company was a public service corporation.

We desire to say that in the Statement, beginning on page 3 of the brief of the plaintiff in error and elsewhere in the brief, there are many statements of alleged facts which the Court will fail to find in the record, but as they are so immaterial to the issue which we are presenting, we do not burden this reply with reference to them.

We can but repeat that there was a question of fact before the Supreme Court of Arkansas as to whether the Clear Creek Oil & Gas Company was a public utility, or that the parties contemplated it operating as a public utility when they entered into the contract. That issue has been decided against the plaintiff in error purely on the weight of evidence. All the contentions as to the law made by the plaintiff in error have been sustained by that Court. Therefore, there is nothing for this Court to review.

Respectfully submitted,

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JAN 29 1925
WM. R. STANSB
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No. 266

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

FORT SMITH SPELTER COMPANY,
PLAINTIFF IN ERROR,

vs.

CLEAR CREEK OIL & GAS COMPANY,
DEFENDANT IN ERROR

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR

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INDEX

	Pages
Statement	3-13
Argument	13-39
There is No Federal Question Presented	13-21
On the Merits	21-28
Erroneous Statements	29-31
The Public Served	31-36
There is no Impairment of a Contract	36-39

CITATIONS

Alliance Insurance Co. vs Lewis, 233 U. S. 389	21
Arkansas Natural Gas Co. vs Arkansas Railroad Com., 261 U. S. 379	33
Armour Packing Co. vs United States, 209 U. S. 56	37
Ballard vs Hunter, 204 U. S. 241	19
Brown vs Smart, 145 U. S. 454	39

CITATIONS—Continued

Pages

Calor Oil & Gas Co. vs Franzell, 128 Ky. 715, 36 L. R. A. (N. S.) 456 31

City of Camden vs Arkansas Light & Power Co., 145 Ark. 205 38

Clear Creek Oil & Gas Co. vs Fort Smith Spelter Co. 274 Fed. 906 11

Crawford & Moses' Digest, Sections 3969, 3970, 3971, 3972, 7316 4-5-9

Cresswell vs Knights of Pythias, 225 U. S. 261 16

Clarksburg Light & Heat Co. vs Pub. Service Com. of W. Va. 100 SE Rep. 551 32

Columbia Ry. Gas & E. Co. vs S. Carolina, 261 U. S. 236 39

Dower vs Richards, 151 U. S. 658 15

Georgia Ry. and Power Co. vs Decatur, 262 U. S. 432 33

Kirby's Digest, Sec. 5445 11

Kansas City Bolt & Nut Co. vs Kansas City L. & P. Co. 275 Mo. 529 39

Kansas City vs Albers Commission Co., 223 U. S. 573 17

Levy Leasing Co. vs Siegel, 258 U. S. 241 39

Leiper vs Baltimore & Phil. Ry. Co. 262 Pa. State 328 37-38

Ohio & C Smelting & Ref. Co. vs Public Utility Com. of Colorado, 197 Pac. Rep. 1082 39

Producers Trans. Co. vs Railroad Com. of Calif., 251 U. S. 228 19-37

Pulaski Heights Sewerage Co. vs Loughborough, 95 Ark. 264 14

Quimby vs Boyd, 128 U. S. 658 16

Ross vs Oregon, 227 U. S. 150 39

St. L. SW Ry. Co. vs State of Ark. ex rel. Norwood, 235 U. S. 350 19

Truax vs Corrigan, 257 U. S. 312 16-17

Union Dry Goods Co. vs Ga. Pub. Serv. Corp., 248 U. S. 372 38

Waters Pierce Oil Co. vs State of Texas, 212 U. S. 86 16

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STATEMENT

For brevity the plaintiff in error will be referred to as the Spelter Company and the defendant in error as the Gas Company.

The Gas Company was incorporated on the 25th of July, 1914, under the incorporation statutes of the State of Arkansas. The general nature of the business purported to be transacted by the corporation among other things was: "For the purpose of sinking wells, boring for, providing and transporting crude oil and natural gas, coal, asphalt, and any other minerals which may be found in the development of their property." (R. p. 21.)

The Legislature of Arkansas on May 2, 1905, passed an Act entitled: "An Act to confer the right of eminent domain upon companies developing the mineral, oil and natural gas resources of the State." (Acts 1905, p. 577.)

The first section of this Act reads as follows:

"Any corporation organized by virtue of the laws of

this State, for the purpose of developing and producing mineral oil, or petroleum, or natural gas in this State, and marketing the same, or transporting or conveying the same by means of pipes from the point of production to any other point, either to refine or to market such oil, or to conduct such gas to any point or points to be used for heat or lights may construct, operate, and maintain a line or lines of pipes for that purpose along and under the public highways and the streets of cities and towns, with the consent of the authorities thereof, or across and under the waters and over any lands of the State, and on the lands of individuals, and along, under, or parallel with the rights of way of railroads, and the turnpikes of this State; provided, that the ordinary use of such highways, turnpikes, and railroad rights of way be not obstructed thereby, or the navigation of any waters impeded, and that just compensation be paid to the owners of such lands, railroad rights of way, or turnpikes, by reason of the occupation of such lands, railroad rights of way, or turnpikes by said pipe line or lines."

The same is found digested as Section 3969 of Crawford & Moses' Digest.

The second Section provides in the event such companies shall fail upon application to individuals, railroads, or turnpike companies to secure such right of way by consent, then such corporation shall have the right to proceed to procure the condemnation of such property, lands, rights, privileges, and easements in the manner now provided by law for taking private property for right of way for railroads as provided in other sections of the Digest.

Crawford & Moses' Digest, Section 3970.

The third Section provided that whenever such corporation shall desire to construct pipelines it may enter upon the lands of individuals, or right of way of railroads, etc., to survey, locate, and lay out its pipelines, being liable for damages that may result by reason of such acts, and shall designate on a plat or map to be made and filed with the county clerk, the width of the strip of land needed to be condemned for its purposes, location, etc.

Section 3971 of Crawford & Moses' Digest.

The fourth Section made it a misdemeanor to injure or

molest any pipes used for the transportation of oil or gas. Crawford & Moses' Digest, Section 3972.

The promoters of the Gas Company acquired leases on about 25,000 acres of land; then organized the company, capitalized at $30,000.00,—$15,000.00 in cash and $15,000.00 the value of the leases.

In November, 1915, they drilled a well in Crawford County and produced a gas well of 12 million cubic feet per day. This was located about eight miles east of the city of Van Buren, which is located five miles north of the city of Fort Smith. At that time Fort Smith was supplied with natural gas from the Mazzard and Poteau fields, which was sufficient to supply said cities with gas for domestic and commercial purposes, but the industries were operated with coal as fuel. The first step taken by the Gas Company was to find a market for its gas (R. p. 30-31). This it sought in the existing industries and especially sought to bring in new industries and advertised for them (R. p. 4).

The first contract which the Gas Company made was with Kerr and Buck, who in turn assigned it to the Fort Smith Spelter Company, which was organized to construct and operate a smelter which was located at South Fort Smith, an industrial community five miles south of the city of Fort Smith. This is the contract in controversy; it is dated March 17, 1916.

Prior to the time this contract was executed the Gas Company had done the following acts after it brought in its discovery well. It increased its capital stock from $30,000.00 to $50,000.00 and issued $15,000.00 of the increase and sold the same at $5.00 for $1.00 of the face value—realizing $75,000.00 for the purpose of development (R. p. 3-37).

Money was borrowed from Speer Hardware Company to pay for the pipe line and a bond issue put on the property of $111,000.00.

Having thus financed itself the Gas Company at once began drilling wells.

This development began before this contract was made and proceeded until the 15th of September of that year, when there were ten wells producing eighty-seven million

cubic feet (R. p. 51-55). On February 7, 1916, the Gas Company got a franchise from the town of Alma, which is a town in Crawford County close to the gas field. On March 2, 1916, it obtained a franchise from the town of Conway, and on March 14, 1916, it obtained a franchise from the town of Clarksville. There was much newspaper publicity of these franchises but no pipe line was built to either of these towns (R. pp. 33, 49, 67).

The county court of Crawford County granted the petition of the Gas Company to lay and maintain its pipes along certain public roads in Crawford County, and laterals from the gas wells to a connection with the pipe line, under terms and conditions stated in the order of the 5th day of April, 1916 (R. p. 130-131). This was some two weeks after this contract was made, but the petition for this order had been on file about 60 days prior to the date it was granted (R. p. 48). Hence, this petition was pending in Crawford County Court at the time the contract was made.

The Gas Company commenced figuring in January on a pipe line finding out how much it would cost and placed its order for a pipe line early in March; this was for a 10-inch pipe line which was afterwards laid. This order was made before the contract of March 17th. The plans of the company to build this 10-inch pipe line was fully gone over with Kerr and Buck at the time they entered into this contract according to Mr. Robertson, Secretary of the company, who negotiated this deal in conjunction with Mr. Speer, who has since died (R. p. 99).

Mr. McGehee, who did not negotiate it and was living at Alma at that time, mistakenly stated that this pipe line was not ordered until after the contract. Mr. Robertson is evidently correct, because Mr. Kerr testified as a witness after Mr. Robertson testified and did not question his statement.

The pipe line cost $165,000.00 and extended from the field through Van Buren and Fort Smith to South Fort Smith, a distance of about 18 or 20 miles (R. p. 50-51).

This 10-inch pipe line had a capacity of 14,908,000 feet per 24 hours (R. p. 76). The maximum consumption of

the Spelter Company was 3,800,000 cubic feet per day (R. p. 44).

The following acts were done by the Gas Company shortly after this contract was made: A franchise was granted by the city of Van Buren on March 25, 1916, just one week after the contract was made. This ordinance is found on record pp. 134-137. It is an ordinance granting the Gas Company a franchise for 37½ years, fixing the maximum price to be charged for gas and gives it the right and privilege of using the streets, avenues, alleys and public grounds in said city for the purpose of laying, removing, repairing pipe lines or making connections to mains, laterals and service pipes used for the purpose of conveying natural gas to any public or private building in the city, and other terms usual in such franchises.

A franchise from the city of Fort Smith was granted April 3rd and is found on record pp. 132-134, and is similar to the Van Buren ordinance, giving it right of way over the streets, avenues, alleys and public grounds of the city for its pipe line under the terms and conditions therein stated.

The order of the county court of Crawford County granting the Gas Company a right of way over the highways of Crawford County was granted on the 5th of April, 1916, and is found on pp. 130-131 of the record. The Gas Company entered into a memoranda agreement with Vogelstein & Co., which was afterwards called the Arkansas Zinc & Smelting Corporation, which built a smelter near Van Buren, to furnish it a supply of gas on March 18, 1916 (R. pp. 119-120).

Mr. McGehee states this date as March 21st (R. pp. 49-51). A formal contract was later entered into between Vogelstein and the Gas Company of date May 3, 1916 (R. p. 50). All of these acts referred to were performed after March 17, 1916, but were done so shortly thereafter that it is safe to make the statement that all of them were done prior to the Spelter Company spending any money whatever towards carrying out its contract of March 17, 1916. That contract is set out in full at record pp 23-29. It was conditioned on the second party securing a satisfactory site for switches and tracks without cost to the Spelter Company (R. p. 28).

This location was donated by the Business Men's organization of Fort Smith (R. p. 31).

The terms of the contract show unmistakably the Spelter Company knew that the Gas Company was intending to engage in the business of transporting and marketing natural gas, and in support of this statement, attention is called to the following clauses thereof:

It recites that the Gas Company has the right, by contract or otherwise, to produce, take or market natural gas from certain lands situated in Crawford, Franklin and Sebastian Counties, comprising a total of 30,000 acres, more or less, as covered by blue print attached, and that the Gas Company intends and agrees to procure by lease additional lands (R. p. 24).

The tenth clause gives the Smelter Company the right to the first call on gas of the Gas Company, and provides that notice to third parties is given accordingly; that it has the first call upon all gas obtained from lands within the counties mentioned, or other territory which may be acquired by the Gas Company, and that it is prior and superior to any contract or agreement made or which may be made for furnishing gas to others from said territory.

The eleventh clause recites as the supply of natural gas is of uncertain duration, and the construction, maintenance and successful operation of said smelting plant will require a heavy investment of capital and an abundant and stable supply of natural gas, and to the end that the supply now being, or which may be hereafter obtained by the Gas Company may be conserved for the purpose of this contract, the Gas Company agreed that it would not directly or indirectly supply or furnish natural gas from the territory to consumers or others in an amount exceeding in the aggregate fifteen percent of the open flow test of the total volume of gas produced or procured from time to time by the Gas Company. There was a proviso, however, that if it could be demonstrated and shown to the reasonable satisfaction of the Spelter company that 20% open flow would not endanger or shorten the life of the field, then, in such event, use of 20% open flow would be satisfactory to both parties. (Subsequently the Legislature of Arkansas in an Act of March 3, 1917, limited the amount of gas taken from any

well to an aggregate of 20% of the open flow test of the total volume of gas produced out of the wells. Crawford & Moses' Digest, Section 7316).

In the 14th clause it was agreed that should the Gas Company sell gas to any consumers other than churches, schools, hospitals or charitable institutions at a less price than named in this contract that the Smelter Company shall pay for all gas consumed on a price basis equal to such lower prices during the entire time they are in effect.

After these early actions toward the development of the gas field and the marketing of the gas the Gas Company proceeded to lay its pipe lines along the highways of Crawford and Sebastian Counties under orders of their respective county courts, and through the cities of Van Buren and Fort Smith to the plant of the Spelter Company at South Fort Smith, and began delivering gas to it at the time of its completion in June, 1916 (R. pp. 34-35).

The Gas Company's next customer after the Smelter Company was Vogelstein & Company, which contract as stated was first a memoranda agreement of March 18 or March 21 and later the formal contract of May 3, 1916.

This company advanced $45,000.00 to be repaid in gas to help to pay for the pipe line and provided that its call on the gas was subsequent to that of the Kerr and Buck contract.

The next contract was made on the 8th of November, 1916, between Chas. T. Orr, which became the Athletic Smelting & Mining Company's contract and it was subject to the two prior contracts.

The next contract was with C. P. Zenor and others, which is called the Model Window Glass Company, and it was subject to the three smelter contracts, and the next contract was with Parks and Carney, which is called the Radiant Glass Company, and it was subject to the four preceding contracts. Altogether the Gas Company took on 19 industries and also had domestic customers at South Fort Smith and in the Kibler field (R. p. 34-36).

The amount of gas furnished these various industries was as follows: The Fort Smith Spelter Company, 3 million,

eight-hundred thousand cubic feet per day; the Arkansas Zinc & Smelting Corporation, one and a quarter or one and a half million cubic feet per day; the Athletic Mining & Smelting Company three and a half to four million cubic feet per day. The two glass companies, one and a half million cubic feet per day, and the other customers about a half million cubic feet per day, making a total of approximately eleven million cubic feet per day supplied to the various customers (R. p. 44).

In this connection attention is called to the 7th clause of the contract. This provides for the Gas Company to furnish five million cubic feet per day to the Spelter Company, but as shown in the evidence the plant erected by the Spelter Company only called for a maximum consumption of 3,800,000 cubic feet per day. This clause of the contract further provided that on 120 days notice in writing the Gas Company agreed that it would furnish the Spelter Company additional gas up to 12 million cubic feet per day, but the increase of its plant was never made and this part of the contract was never brought into operation.

In 1918 the company found that its gas was short and it began cutting off its customers (R. p. 38). It found much of their leased territory unprofitable and dropped a large part of the acreage as unproductive. They found they could not produce gas at the price they were selling it and attempted to get their customers to increase the price so it could develop the field, and they refused to do so; the Gas Company submitted them their books showing the cost of gas. They notified their customers outside of the five large ones to cease using their gas and finally notified the glass factories to cut off, and then notified the Athletic Smelting & Mining Company to cut off. Their efforts to put customers off the lines resulted in injunction suits. They cut off all their customers except those that they were prevented by injunction, except the City Water Works. They served notice on the City Water Works and the reason they did not cut off was the Fuel Administration took charge in October, 1918, and continued in charge until February 1, 1919 (R. p. 39-40).

Under the Fuel Administration all priorities were abolish-

ed and during that time they drew more than 20% of the open flow because they could not cut off any body.

When these cases came to trail on February 7, 1919, in the Chancery Court at Fort Smith, there was an agreement reached which the Gas Company considered was a valid contract, for 8 cents as the price of the gas in lieu of the 4 cents, and it was contended by the Spelter Company that no valid contract was made (R. p. 40-41). This resulted in litigation between the Gas Company and the Smelters as to whether there was a valid contract for 8 cents in lieu of the 4 cent contract, and that litigation went to the U. S. Circuit Court of Appeals and was decided against the Gas Company. Clear Creek Oil & Gas Co. vs. Fort Smith Spelter Co., 274 Fed. 906.

At the time of this alleged 8 cent agreement there was no regulatory body in Arkansas which had jurisdiction to fix the rates between the Gas Company and the consumers or the public. The only regulation in Arkansas at that time was of railroad rates by the Railroad Commission, and water, gas, and electric rates under certain limitation of utilities operating within municipalities, and that regulation was solely to fix such rates after complaint had been made that the rates charged were exorbitant. Kirby's Digest, Sec. 5445.

This Gas Company was operating a pipe line from the Crawford County field through two cities and into a village where the Spelter Company was located, and was not so far as this Spelter Company was concerned, under the jurisdiction of any municipality, or any other regulatory body; this was also true of the other two smelters.

The General Assembly of 1919 passed Act 571, which was approved on April 1, 1919. This Act created the Corporation Commission and Section 5, paragraphs b and c vested it with jurisdiction over all pipe line companies for the transportation of oil, gas and water, and over all gas companies furnishing gas for lighting, heating or power purposes. It clothed the Commission with power in Section 8 to establish rates after reasonable notice and full and complete hearing for all utilities of which it had jurisdiction.

The Gas Company, pursuant to said Act, filed its petition

before the Corporation Commission on the 17th of March, 1920, against the three smelting companies. It set forth fully the situation of the Gas Company and of said smelters, of its financial condition, of the cost of producing gas, and that it was a public utility operating under and pursuant to said Act and under the regulation of the said Corporation Commission.

It alleged it made a contract with the smelters for 4 cent gas and that it contended that that contract had been supplanted by a contract for 8 cent gas, which the smelters denied, and alleged that either rate was unjust, unreasonable, insufficient, inadequate and discriminatory, and alleged that the 4 cent rate was unjust in that the gas was being furnished to the smelters at less than the cost of production, and would lead to inevitable bankruptcy, and the smelters were making excessive profits from their investments without permitting the Gas Company to make any return upon its investment, and that it was unable to develop its leases, and that their competitors were draining their leases of the gas therefrom, and alleged that whether the contract rate was 4 cents or 8 cents that either was inadequate and insufficient to pay the cost of producing gas, and the petitioner was entitled to a rate to pay the cost of production and a profit on the investment, and alleged that the rates are an injustice to the public as well as the Gas Company in that they stifle the development of the field and prevent the public from having the benefit of a larger production of gas as fuel for factories and industries in Fort Smith and Van Buren, and prays for the establishment of a reasonable rate, and alleged that 10 cents per 1000 cubic feet was the lowest rate that would be reasonable (R. p. 3-11).

The smelters responded to this petition, their principal defense being that the regulation of rates by the Corporation Commission would be an impairment of the obligation of their contracts. There was a full and complete hearing before the Corporation Commission, in addition to the evidence which is preserved in the present record, there was also testimony adduced that the cost of producing and delivering gas to the smelters was at no time during the period that gas was furnished to them less than 6 cents per thousand cubic feet, and the cost thereof ran as high

as 8 cents per thousand cubic feet, and that the Arkansas Zinc & Smelting Corporation at Van Buren, after the first year of operation, paid the Twin City Pipe Line Company 9 cents per thousand cubic feet for two thirds of its supply of gas, and testimony that the price of gas at South Fort Smith where the Spelter Company is located should be 2 cents more than the price of gas at Van Buren (R. p. 1-2).

This hearing resulted in the Corporation Commission fixing a sliding scale for gas running from 9 cents to 15 cents; the higher brackets were for small quantities of gas; the net result of the rate to such large users as the smelters amounted to a trivial fraction over 9 cents per 1000 cubic feet (R. p. 139).

Under said Act of 571 there was an appeal to the Circuit Court of Pulaski County from the order of the Corporation Commission and an appeal from the Pulaski Circuit Court to the Supreme Court. All of the court reviews were had upon the record made before the Corporation Commission. This order was before the Supreme Court three times, and it is from its final order placing in effect the rates established by the Corporation Commission that this writ of error is prosecuted.

ARGUMENT

THERE IS NO FEDERAL QUESTION PRESENTED:

Probably it would have been better practice to have filed a motion to dismiss the writ of error, instead of presenting this question on the hearing, but as the writ was granted by a Justice of this Court, it seemed that it should be presented on the whole record, rather than summarily on a motion to dismiss.

Before the Smelter Company can reach the question of impairment of the contract it must be found:

(1) That the Gas Company was not a public utility at the time the contract was made.

(2) "Or during its subsequent operation the pipe line was (not) devoted by its owner to public use."

The Supreme Court of the State unanimously decided

against the Spelter Company, but divided as to the basis of decision; the majority opinion gave widest sweep to all of the Spelter Company's contentions, and held that notwithstanding the Gas Company's charter authorized it to operate a pipe line company and the Act of 1905 granted eminent domain to pipe line companies and gave them right of ways over highways and public places, that unless the Gas Company elected to operate as a pipe line under said Act at the time it made this contract that it did not become a public utility, and in the event of its election not to do so it could have entered into private contracts not subject to public control or regulation.

In other words it was not necessarily a public utility merely because its charter authorized it, and it was not a public pipe line company merely by the Act of 1905 conferring public powers on pipe line companies, and that it did not become a public utility merely by force of this statute without anything done pursuant to the statute itself, or in other respects to make itself a public utility (R. p. 155-158).

Then the Court held following Pulaski Heights Sewerage Co. vs. Loughborough, 95 Ark. 264, that if a corporation organized to carry on a business mentioned in the statute takes advantage of the terms of the statute making it a public corporation it then becomes a public utility, subject to the State's control.

It was further held that if a business is conducted as entirely private it is not within the power of the Legislature to confer upon it the power of eminent domain, as that is a power that can only be exercised solely for the benefit of the public (R. p. 158).

Thus the extremest contentions made by the Spelter Company as to its rights under the Federal Constitution were sustained in the prevailing opinion, and the majority decided against the Spelter Company upon the ground that the contract itself and the evidence adduced "indisputably stamp these contracts as being made in contemplation of the entrance of appellant (the Gas Company) upon the operation of a business which was public in its character and was intended as a preferential right against the public." (R. p. 159.)

In reaching this conclusion the Court carefully reviewed all the facts that were in evidence in the light of the circumstances surrounding the parties at the time the contract was made. These facts were set forth fully in the opinion of the court.

The assignment of error (R. p. 188-9) do not allege that there was no evidence before the Supreme Court to sustain its finding that the Gas Company was a public service corporation, or contemplated becoming such when the contract was made with the Spelter Company. The assignments are merely that the Supreme Court erred in so holding and deciding. The assignments of error do not allege that there was no evidence before the Supreme Court to sustain it in holding and deciding that the contracts on their face and in the light of the testimony contemplated the exercise of eminent domain by the Gas Company, but merely that the Court erred in so holding and deciding. In fact the learned counsel could not in view of the evidence before the court have made any other assignments of error than they did make.

It is quite apparent from this record here that there were sufficient facts before the Supreme Court of Arkansas to justify it in holding that the Gas Company was a public utility at the time it made the contract and that it was contemplating and expecting to exercise public rights under the Act of 1905 in performing this contract; and that these facts and other facts, such as the franchises shortly after granted it in the cities of Fort Smith and Van Buren, which it utilized in order to construct their pipe lines to the Spelter Company's plant, as a prerequisite to transporting gas to the Spelter Company under this contract indicated that it was intending to operate only as a public utility.

That these facts were sufficient to impress themselves upon the Spelter Company as notice to it that the Gas Company was intending to operate as a public utility in the transportation and marketing of its gas when it made said contract is equally clear.

In Dower vs Richards, 151 U. S. 658, this court said:

> "The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court

of California is that its decision in matter of fact was erroneous, and contrary to the weight of the evidence in the case. But to review the decision of the State Court upon the question of fact is not within the jurisdiction of this court.

"In the legislation of Congress, from the foundation of the Government, a writ of error, which brings up matter of law only, has always been distinguished from an appeal, which unless expressly restricted, brings up both law and fact," citing many cases.

In Quimby vs Boyd, 128 U. S. 658, this court said:

"Alleged errors of the State Court which involve questions either of fact or of State law and not of Federal law, are not reviewable here on writ of error."

In Waters-Pierce Oil Co. vs State of Texas, 212 U. S. 86, the Court said:

"Nor does this court sit to review the findings of facts made in the State Court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court."

A clear distinction is drawn between such cases reviewing mere matters of weight of evidence and such cases as Creswell vs Knights of Pythias, 225 U. S. 261, and Truax vs Corrigan, 257 U. S. 312, where a Federal right had been denied as a result of the finding of fact where it was contended there is no evidence whatsoever to support it, and the evidence being in the record, then the resulting question of law is open for decision here.

There is another class reviewable here where a conclusion of law as to a Federal question and a finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to consider the facts to the extent necessary to do so to determine the Federal question.

It cannot be properly contended here that the finding of fact is intermingled with the asserted Federal right as to be essentially necessary to consider the facts for the purpose

of passing upon the Federal question, because the Federal question here involved is whether the order of the Corporation Commission fixing a 9 cent rate in lieu of the contract rate of 4 cents was an impairment of the obligation of the contract, whereas the finding of fact here is whether the facts in the record constituted the Gas Company a public service corporation within the meaning of the Act of 1905, conferring upon such pipe line corporations the right of eminent domain and other attributes of a public service corporation.

This question is wholly disconnected from the later question as to whether there was a Federal right impaired by the order in question, and this is a mere question of whether the facts in evidence here showed that the Gas Company was operating or expecting to operate as a public service corporation within the meaning of the Act of 1905, and that the Spelter Company knew that fact when it entered into the contract with it.

Hence the review of facts on that question are not intermingled with the alleged impairment of the obligation of the contract by the later finding of the Corporation Commission as to the proper rate to be charged by it, then the Gas Company was indisputably a public service corporation. Nor is there any mixed question of law and fact here as referred to in Kansas City Ry. vs Albers Commission Company, 223 U. S. 573, and Truax vs Corrigan, 257 U. S. 312, because there is no dispute over the question of the law if the Gas Company was a public utility when the contract was made, then the obligation of the contract was not impaired.

The Chief Justice in stating the case said:

> "Learned counsel for appellee (Spelter Company) candidly concede that if appellant was organized as a public service corporation and at the time of the execution of these contracts it was operating as such public utility in the production and distribution of gas that the contracts were void so far as they undertook to confer special privileges to appellees, and that the schedule of rates for prices of gas is subject to control by the Corporation Commission even though the statute authorizing such regulations was not passed until after

the contracts were executed. It is unnecessary, therefore, to cite authorities on that question. Such authorities are cited on the briefs of counsel." (R. p. 153.)

Therefore it is seen that the point put before the Supreme Court was this mere question of fact as to the status of the gas under the Act of 1905, to be determined by it on the testimony then in the record, and as heretofore shown there is no contention made that there was no evidence to sustain the finding. Hence, there is no Federal question for review upon this writ.

The minority of the court concurred in the conclusion of the majority that the Gas Company was a public utility at the time it entered into the contract with the Spelter Company, but upon different grounds. They regarded it as extremely doubtful if the power existed in the Gas Company to elect as between its private and public status that such election had been made at the time the contracts were entered into; they said that at that time the Gas Company did not possess a pipe line and had not attempted to exercise the power of eminent domain to acquire right of way for one, and the contracts on their faces contained preferential clauses which point to the fact that it was in the minds of the parties that the Gas Company at the time was a private corporation, and that such clauses as these in the contract of a public utility would have rendered the contract void, and that it could hardly be conceived that parties of such intelligence entered into a contract carrying clauses which necessarily rendered the contract from its very inception void.

It may be said in passing that the learned Judges overlooked the fact that at this time there was no regulatory body in Arkansas to fix the rates of pipe lines operating as this one was operating, and to use a slang expression, as the law then stood, the parties could "get by" with such contracts. However, the minority Judges held that the character of the business conducted by the Gas Company was subject to regulation by the State, and being subject to such regulation, the State might at any time convert such corporation into a public utility by conferring upon it the power to exercise the right of eminent domain. That such right could not be conferred upon a private corpora-

tion; so the very act of conferring the right of eminent domain upon a private corporation organized for the purpose of developing and marketing natural gas converted it *eo instanti* into a public corporation.

"The power to exercise the right of eminent domain, and not the exercise thereof, is the mark which stamps its character upon it." These Judges held that the Act of 1905 vested in pipe line corporations the right of eminent domain, and it did not remain in abeyance until it chose to exercise it. Therefore these Judges concurred in the judgment on the ground that the law made the Gas Company a public service corporation from the time that it was chartered to do a pipe line business, and hence no contracts made with it preferential in character could be sustained.

If the opinion of the minority was sustained as the proper interpretation of the Act of 1905 then under that view there would certainly be no Federal right presented on this writ of error, because this would be the state court's construction of the meaning of its own statute. What the statute meant was for the Supreme Court of the State to determine, and it is only the statute as thus interpreted that this court may consider it. St. L. SW. Ry. Co. vs State of Ark. ex rel. Norwood, 235 U. S. 350; Ballard vs Hunter, 204 U. S. 241.

Another view of the status of the company was taken by the Corporation Commission. It decided that it was immaterial to determine whether the Gas Company was a public service corporation at the time this contract was made or not, because it had unquestionably become such at the time it petitioned the Corporation Commission to regulate its rates.

There was then no question that it was a public service corporation and the Corporation Commission applied what it interpreted as the correct rule deduced from the decision of this Court in Producers' Transportation Co. vs R. R. Commission of Calif. 251 U. S. 228. That company was organized under the laws of California in 1909. Its pipe line was put in operation in 1910. Its articles of incorporation authorized it to do a transportation business. In acquiring right of way it resorted to the exercise of eminent domain, admissible only if the condemnation was for a "public use,"

under the California code. Only a part of its right of way was thus acquired; the remainder was acquired privately.

Thereafter California passed a statute creating the Railroad Commission with extensive powers over rates and practices of those who operated public utilities and in 1913 passed a statute declaring every private corporation or individual operating any pipe line for transportation of crude oil for public hire, which pipe line is constructed and maintained along and over public highways and in favor of whom the right of eminent domain exists, shall be deemed a common carrier and subject to regulation by the Railroad Commission, and this Court stated:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the State could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the 14th Amendment," (citing authorities)

The Court continued:

> "On the other hand, if in the beginning or during its subsequent operation the pipe line was devoted by its owner to public use, and if the right thus extended to the public has not been withdrawn, there can be no doubt that the pipe line is a public utility and its owner a common carrier whose rates and practices are subject to public regulation. Munn vs Ill. Supra."

The Corporation Commission was right in holding that it was immaterial whether the Gas Company was a public utility when it made the contract or not, because this case conclusively determined the question that if the Gas Company was a public utility at the time of hearing, it was subject to regulation.

It cannot be said here that it made a private contract and its pipe line was never devoted to the public use, for

it is unquestioned that shortly after the contract was entered into that it obtained franchises and permits which it did use in building its pipe lines from the gas fields to the Spelter Company's plant through the streets of two cities and through the highways of two counties under public authority authorizing the same.

Thus in its subsequent operation, even if it be conceded that it was a private concern when the contract was made, the pipe line did become public and that right was never withdrawn, and hence under this decision, the company was subject to regulation at the time the Corporation Commission acted in the premises, and hence there is nothing to review on writ of error as this question was settled in the Transportation Company's case.

ON THE MERITS:

The decision of the Supreme Court of Arkansas is clearly right on the facts.

Much of the argument of the Spelter Company is based on erroneous statements.

The Gas Company incorporated to produce, transport and market natural gas. It is thoroughly settled that such corporations are proper subjects of public regulation.

In Alliance Insurance Co. vs Lewis, 233 U. S. 389, this Court said:

> "There are other utilities which are denominated public, such as the furnishing of water and light, inincluding in the latter gas and electricity. We do not hesitate at their regulation, nor at the fixing of prices which may be charged for their service."

The transportation of natural gas was recognized by the statute of 1905 heretofore quoted, as of such public importance that corporations created for this purpose were invested with the power to occupy public highways and public places of the State and to acquire right of way by eminent domain.

This company acquired 30,000 acres of land for gas exploration and brought in a gas well in Crawford County in November, 1915, at a point eight miles east of Van Buren,

a city of 5,000 population, and 13 miles from Fort Smith, a city of 35,000 population. These cities were then supplied with natural gas from two fields, but only sufficient for commercial and domestic purposes. The industries were operating on coal as fuel (R. p. 30-1).

The records show that Fort Smith is an industrial city, having many furniture factories, cotton oil mills, a powder factory, a sorghum factory, a coffin factory, a wheel-barrow factory, a wagon factory, etc. (R. p. 72-3).

The well the Gas Company brought in was of 12 million cubic feet capacity per day, but gas usage restricts the supply to not exceeding 20% of the open flow. The contract in this case limited it to 15%, with a proviso under which it might take 20%; and later a statute of the State limited it to 20%. Therefore the company had for sale only 2,400,000 cubic feet per day.

This was much less than the capacity of any one of the smelters, which were subsequently brought to Fort Smith. Immediately after obtaining this well the Gas Company sought a market for its gas and advertised for industries to come to Fort Smith and sought industries then existing in Fort Smith. These efforts resulted in locating three smelters and two glass factories and obtaining fourteen industrial customers from the existing industries of Fort Smith. (There is some confusion in the record as to whether the 19 customers of the company included the five contract customers or were in addition thereto.)

The first duty of the company was to finance its new-found gas field. Of its $30,000.00 capital stock, only $15,000.00 was cash, the other being for leases and about one-half of that had been used for bringing in the first well.

It issued $15,000.00 of its stock which it sold for $5.00 for $1.00, producing $75,000.00. Then it mortgaged its assets for $110,000.00 and also borrowed from the Speer Hardware Company and obtained an advance from one of the smelters, of $45,000.00, toward purchase of its pipe line.

Manifestly it could do no business of any size upon its one well, and of course its first duty was to drill other wells. Then it immediately, upon financing itself, let contracts for drilling and proceeded so rapidly that by September, 1916,

ten months after its first well was brought in, it had 10 wells producing 87 million cubic feet of gas per day.

The next step was to procure a pipe line to take this gas to market. The company commenced figuring on this in January, and early in March placed an order for a 10-inch pipe which was afterwards laid.

While the financing, contracts for development, and for pipe line were being made the company was not idle in other respects. In February and early March it procured public franchises from the towns of Alma, Conway and Clarksville, and about February 1st filed its petition with the county court of Crawford County under the Act of 1905, which has heretofore been quoted, for the use of the public roads of Crawford County for the purpose of laying its pipe line.

This 10-inch pipe line had the capacity to deliver under 5-pound pressure (the proper delivery pressure) 14,908,000 cubic feet per day (R. p. 76), and the cost of it was $165,000.00. The average cost of a well was about $7,500.00.

Mr. Robertson testified that he and Mr. Speer negotiated the contract with Kerr and Buck and that they had placed the order for the 10-inch pipe line prior thereto, and explained it fully to Messrs. Kerr and Buck (R. p. 99).

Mr. Kerr testified after Mr. Robertson did and did not deny this testimony, and hence it must be taken as an established fact. Yet it is said in the brief: "It is conceded that at this time no pipe line had been purchased." (p.18.) Doubtless counsel were misled by Mr. McGehee's testimony (R. p. 32) that the pipe line had not been purchased, but Mr. McGehee was then living at Alma and only came to Fort Smith to sign the contract after it had been negotiated by Mr. Speer and Mr. Robertson (R. p. 53).

Kerr and Buck, or rather the Spelter Company, the assignee under their contract, erected a smelter with a capacity of 3,800,000 cubic feet per day, a little over 20% of the pipe line capacity.

It is true that in the contract they obtained a right on 120 days notice to have a supply of 12 million cubic feet of gas per day, but they did not build the enlarged plant at

the time nor any time thereafter; that was a mere right never exercised.

In the face of these facts counsel in their brief at page 25 says, referring to the time of the contract:

"Certainly it did nothing up to this time to indicate that it intended to become a public utility." Taking franchises in three towns, applying for public rights over highways, advertising for industries to come to Fort Smith to be supplied with its gas, purchasing a pipe line of a capacity of 14 million cubic feet of gas per day, as evidentiary of intention to enter into a public business are thus brushed aside as proving nothing.

The Spelter Company was evidently looking for great development of the gas industry by the Gas Company. It recites in the contract its large acreage and its intent to procure additional acreage, and it secured a pledge of the first call of all of its gas and a first call under certain contingencies on as much as 12 million cubic feet of gas per day, not as an exclusive right, but as a preferential right, and then has what may be called a "most favored nation" clause to the effect that if the Gas Company sold gas to other customers, except churches, schools, hospitals and charitable institutions at a less rate than the contract rate, that the lesser rate would inure to its benefit (R. p. 29).

The Spelter Company evidently expected great development of this field or they would not have constructed the smelter, it constructed one of a capacity almost double the amount of gas which could have been taken from the then existing well; but as Mr. Robertson stated, he explained to Messrs. Kerr and Buck fully their situation as to the purchase of a 10-inch pipe line, and doubtless also as to letting contracts for 10 wells, the drilling of which was then progressing, and hence they had confidence in the fact that this would be a great gas field, or else they would not have spent $300,000.00 in building a plant—and their judgment was right.

There were four significant facts that occurred immediately after signing this contract which were necessarily known to Kerr and Buck,—first that the company entered into an informal contract with Vogelstein & Company either on

the 18th or 21st of March to supply a smelter at Van Buren with one-third of its gas, which amounted to about 1½ million cubic feet per day. On the 25th of March, the company obtained a public franchise from the city of Van Buren; on the 3rd of April it obtained a similar public franchise from the city of Fort Smith, and on the 5th of April, the County Court of Crawford County granted its petition to use the highways of Crawford County for right of way of its pipe line.

If it were conceded for the sake of the argument that on the 17th of March when Kerr and Buck signed the contract that they did not know that the Clear Creek Oil & Gas Co. was contemplating becoming a public service corporation, certainly after these four events took place they were bound to know it, and up to that time they could have spent practically nothing toward the construction of the smelter, for all of these events occurred in less than three weeks after the contract was signed. If they were misled and signed what they thought was a private contract with a private corporation engaged in private business, certainly before they spent any money in the carrying out of that contract by constructing a smelter, they knew that the Gas Company had entered upon a career of serving the public under ordinances granted it in these two cities giving them the right to use their streets, regulating their rates, and prescribing the terms and conditions upon which they could do a public business within those cities, and the pipe line to the Spelter Company's plant was built through these streets, acquired under these public franchises as well as the public franchises granted by the county courts of Crawford and Sebastian Counties, respectively.

If it had been deceived and misled as counsel seem to indicate, its eyes were open before it could have spent a dollar in carrying out this contract; it was conditioned on the Business Men's Club furnishing a free site and switching facilities.

Before they could construct their smelter or make any material headway toward the construction of it necessarily they knew that this company was launched in a career of public service of considerable magnitude.

Much is said in the brief about the Gas Company seeking

a new contract for 8 cent gas, and its effort to enforce what it regarded as a binding contract to that effect.

It is argued that this evidenced knowledge that it was not a public service corporation subject to regulation. This is a misleading argument under the facts of the case. It is established, (R. p. 56,) and undisputed that litigation arose over an alleged agreement made in the Chancery Court room on February 7, 1919. At that time there was no regulatory body in Arkansas who could establish rates for this company. The Corporation Commission Act was approved April 1st, 1919. Referring to this litigation ending in the Circuit Court of Appeals, counsel say at page 27:

"During all this time it was never intimated by either party that the Clear Creek Oil & Gas Company was a public service corporation, but both parties treated the contract as binding and believed that it was binding."

Turning to the record at pp. 109-110 there is found a letter dated May 27, 1918, to the Gas Company from its counsel replying to their question as to the validity of preferential rights to gas supplied by the company. Counsel expressed the opinion that the "Gas Company is a quasi public corporation which has held itself out to the public as engaged in supplying natural gas to industries and manufacturing plants. That position carries an implied obligation to serve equally to its capacity such class of consumers."

The question as to whether the company had estopped itself by its contract was mentioned, but not considered. The point at issue was whether an industry seeking its gas—one not trammeled by a contract subject to the preferential contracts could in an appropriate suit against the Gas Company and a company holding a contractual preferential right have such preferential right declared void, and counsel expressed the opinion that such suit would succeed and cited authorities upon which they based their opinion, and requested that counsel for the interested parties examine the authorities and advise their clients in the premises. Copies of this letter were furnished to the Spelter Company and the other contract customers (R. p. 110).

At that time, there being no regulatory body to establish rates, the only way that the preferential character of these

clauses could be questioned would be by someone in the same class seeking an equal opportunity to obtain gas from the Gas Company, unless the company itself sought to bring suit to annul them, (which would have been a doubtful proceeding,) but the company did not consider that phase of the matter. The attitude of the company in dealing with its customers and in the litigation that arose between its customers and itself and the preferential customers was that it would seek to live up to the contract priorities, whether valid or not, but it did not assert that they were valid (R. p. 111).

In pursuance of this policy when its gas became insufficient to supply all of its customers, it cut them off in accordance with the terms of its various contracts, seeking to live up to them literally, although it was getting a higher rate from some of the customers that it cut off.

These efforts were in some cases successful, and in other instances were met by injunctions. Before these injunction suits were tried the distribution of its gas passed into the hands of the Fuel Administration (R. p. 38-9). After the Fuel Administration relinquished control on February 1, 1919, then the various cases came on for trial in the Chancery Court, and then the 8 cent contract was made, which proved abortive because not signed by the parties agreeing thereto, and possibly as contended because some conditions were not complied with.

At that time there being no regulatory body to establish rates and the Gas Company contending that it had a valid contract with these smelters for 8 cent gas it sought to enforce the same in the courts.

After the United States District Court directed a verdict against it on the ground that the contract was not in writing, it then took an appeal from that decision to the Circuit Court of Appeals, and thereafter filed a petition with the Corporation Commission, which in the meantime had been created. In that petition (R. pp. 8-9) it set up fully the litigation with its customers and the agreement of the smelters to pay 8 cents per thousand cubic feet for its gas, and the result of that litigation, and that it was still pending on appeal, and maintaining that it had a contract for 8

cent gas, but that whether the contract was 8 cents or 4 cents, that either price was unjust, unreasonable, insufficient, inadequate and discriminatory, and prayed the Commission to establish a just and reasonable rate.

The Section of the statute under which it was proceeding reads as follows: "Commission Authorized to Establish Rates: The Commission shall have the power, after reasonable notice and after full and complete hearing, to enforce, originate and establish, modify, change, adjust and promulgate tariffs, rates, joint rates, tolls and schedules for all public service corporations; and whenever the Commission shall, after notice and hearing, find any existing rates, tolls, tariff, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of the law, the Commission shall, by an order fix reasonable rates, joint rates, tariffs, tolls, charges or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory, inadequate or otherwise in violation of any of the provisions of this law." Sec. 8, of Act 571 of 1919.

This case was fully developed before the Corporation Commission, and all subsequent trials were upon the record there made. It was established that at no time while the company was selling its gas to the Spelter Company for 4 cents per thousand cubic feet was the cost of gas less than six cents per thousand cubic feet, and the cost was at times as high as 8 cents per thousand cubic feet.

The Van Buren smelter was after its first year paying 9 cents to another company for two-thirds of its gas and 4 cents to this Gas Company for one-third of its gas, and that the cost of delivery to the Spelter Company located at South Fort Smith was 2 cents higher than the cost to the Van Buren smelter (R. p. 1-2).

Certainly during the time this condition of affairs existed had there been a regulatory body in Arkansas clothed with jurisdiction over these rates, its jurisdiction should have been promptly invoked.

ERRONEOUS STATEMENTS

Some of the erroneous statements in the brief deserve attention. On page 26 it is said that without this contract the Spelter Company would not have located at Fort Smith, and "without this contract the Clear Creek Oil & Gas Company would have had no sale for its gas." The undisputed facts are that shortly after the Gas Company started operation it sold the following amounts of gas daily to its various customers: To the Fort Smith Spelter Company, 3,800,000; 1¼ or 1½ million cubic feet to the Van Buren Smelter; 3½ to 4 million to the Athletic Mining & Smelting Company; 1½ to 2 million cubic feet to the glass factories; and about one-half million cubic feet to other customers. A total of approximately 11 million cubic feet of gas per day (R. p. 44).

At page 25 it is said that the Gas Company had no market for its gas and both the cities within its reach were already supplied by other gas companies, and it could not sell any gas in either Fort Smith or Van Buren, and it had, in fact, been unable to sell any to any persons up to the time it entered into this contract.

The record shows that Fort Smith and Van Buren were supplied by other gas companies with domestic and commercial gas, but the industries did not generally use it. They were operating on coal (R. p. 31).

It is true that it had not sold any of its gas up to the time it entered into this contract because it had not then progressed to the point to sell gas to anyone. It only had one well, but was making progress to have 9 more. It had no pipe line, but had given an order for a 10-inch pipe line and it was diligently obtaining public franchises and rights from public authorities so that it could reach its market, which was not among the farmers of Crawford County, but in the cities of Fort Smith and Van Buren.

It is true that the Spelter Company was its first customer but the Van Buren smelter followed in a few days, and the other customers shortly thereafter, until its pipe line was four-fifths filled in a short time (R. pp.32-33).

There are various quotations from the petition of the Gas Company to the Corporation Commission in the brief. In

the last quotation on page 33 of the brief there is an inadvertent mistake. It should read: "In view of the *then* cost of producing gas it appeared that it would be a compensatory rate." (R. p. 7.) The "then" being omitted from the quotation, and the *then* is the key to the entire allegation which is set out on page 7 of record, which is to the effect: that the Gas Company having produced a well for $6,000.00 of 12 million cubic feet, and that was its only information of the cost and it thought that a 4 cent rate would be compensatory, but within a short time other companies began operating in the field; two other pipe lines were constructed delivering gas to Van Buren and Fort Smith, and the result of such operation was to rapidly deplete the volume of gas in all of the wells in the field and diminished the rock pressure, so that when the petitioner ceased development in 1918 the cost of drilling had increased to $7,500.00 per well, and the amount produced from a well was not over 2½ million cubic feet, thereby requiring five wells to produce as much as the initial well produced and at a cost of not less than $37,500.00 as against the initial cost of $6,000.00 to produce an equal quantity of gas.

Other facts were alleged therein showing that even the alleged contract price of 8 cents was inadequate and discriminatory and the contract price of 4 cents meant quick bankruptcy, and under said contract the development of the field was stifled and the gas of the company taken out by its competitors and the public deprived of the service of this company. At page 34 it stated that the Gas Company admits the contract was reasonable when made, but as seen it admits that it appeared reasonable when made but was shortly discovered to be unreasonable for reasons therein alleged.

In the same sentence it is stated: "And the Arkansas Supreme Court in construing our statute holds that it was at that time not a public service corporation." This is exactly the opposite of what the Court held. It decided that the statute did not necessarily make it a public service corporation, but that the evidence showed that it was acting under the statute and was in fact such at the time the contract was made.

There are other manifest errors in the brief, but they are largely along the lines to which attention has heretofore been called, the discussion will not be prolonged by calling attention to them, because it is evident the learned counsel looked at the facts from the wrong angle.

THE PUBLIC SERVED.

At brief page 34 it is stated: "As a matter of fact, it did not serve the public, because there was no public to serve. According to its own statement it was advertising for purchasers for its gas, was advertising for factories seeking to make contracts with them to furnish them gas, its object being, of course, to find a sale for its gas."

In other places it was argued there was no public to serve; that the public was not a party to this proceeding and that relief could not be granted because the public was not interested.

The petition to the Corporation Commission accurately stated the facts which were later developed in evidence to the effect that when the Gas Company produced its well in the Kibler field there was little gas used for fuel purposes in the city of Fort Smith, the industries therein were operating with coal as fuel, only the commercial houses and residences were supplied with gas for fuel. "The petitioner desired to bring industries to Fort Smith and also to supply the existing industries therein with gas as fuel. The petitioner advertised for industries to come to Fort Smith and that it would furnish the same with gas for fuel and sought to attract capital to Fort Smith to make investment in factories which would use gas as fuel." (R. p. 4.)

The opinion of the company's counsel in May, 1918, copies of which were furnished to the Spelter Company, was that the Gas Company "has held itself out to the public as engaged in supplying natural gas to industries and manufacturing plants." (R. p. 109.)

It makes no difference whether the Gas Company had one customer, or 19 customers, or 1,000 customers, the number of customers does not determine the use. Thus in Calor Oil & Gas Co. vs Franzell, 128 Ky. 715; 36 L. R. A. (N. S.) 456, the court said:

"Nor is it material that appellant proposes to sell all of its gas to the Louisville Gas Company, and in this way distribute it to the citizens of Louisville. The statute gives the appellant the right to condemn a pipe line from its wells to the market for its produce. It contains no restrictions upon the manner of sale; it evidently being the belief of the Legislature that the public interest will be best subserved by affording the owner of the gas an opportunity to sell it upon the market."

Another form of the same question was presented in Clarksburg Light & Heat Co. vs Pub. Service Commission of W. Va., 100 S. E. Rep. 551; P. U. R. 1920 A, 639.

The litigation arose over private contracts for natural gas of transporting and distributing company. The Court said:

"It is argued that the business in which these manufacturing consumers are engaged is entirely private; that the public has no interest therein, no power to regulate it or control it; and this is entirely true, but that argument applies with equal force to every private residence in the city. The public has no right or power to control the conduct of family life. It is as much, if not more, a private use of gas, when it is consumed by a domestic consumer, as when it is consumed by a manufacturing plant. The use made of the substance by the consumer is not the test. If such were the case, then the public service would only extend to such of the petitioner's product as is furnished to purely public institutions, in which class might be placed courthouses, schoolhouses, and public buildings of that character, and all other of its business would be free from regulation by the public authorities."

It was further said by the Court:

"It is argued that the supply of gas to these manufacturing plants is nothing but the sale of the petitioner's product to them. It is true that it is the sale of the gas produced by the petitioner, but it is more. It is the delivery of the same at the point of consumption. For the purpose of this delivery the petitioner

under our law is a public servant. It exercises the power of eminent domain for the purpose of securing rights of way for its pipe lines.

"It extends the same over the public highways and streets, and appropriates them to its uses, as it contends partly for the public good, but partly purely forprivate ends.

"The duty of the petitioner to supply the public with gas is its paramount duty. It makes no difference who that public is, or to what use the gas is to be appropriated. If the petitioner was allowed to conduct one-half of its business under public regulation, and to sell the other half of its product upon private contract, the result would be disastrous to the public, for the rates charged to private consumers would control those charged to the public consumers, or vice versa."

The law on this subject is thus summed up in 20 Corpus Juris, 558: "The character of the use, and not its extent, determines the question of public use. It is not essential that the use or benefit extend to the whole public or any considerable portion thereof, nor that each and every individual member of the community have the same degree of interest therein; the fact that the use or benefit is limited to the inhabitants of a small locality, or that the number of persons who are expected to avail themselves thereof is small, is immaterial provided it is open to all upon the same terms."

In discussing this phase of the case counsel cited Arkansas Natural Gas Company vs Arkansas Railroad Commission, 261 U. S. 379, and Georgia Railway & Power Co. vs Decatur, 262 U. S. 432; neither of these cases decided any issue which is involved herein.

The Arkansas case decides two points: First, as to whether a contract between two utilities over a division of receipts from customers could be abrogated by the Railroad Commission, and second, whether a certain classification of utilities as subject to regulation was valid. This was a contest between a producing company and distributing companies of natural gas wherein the collections from the sale of gas were divided between the companies upon

percentages agreed to in the contract. The producing company asserted that the income afforded by these divisions was inadequate and amounted to confiscation and this result was in large part due to improper and wasteful methods of distribution on the part of the distributing companies.

The Commission was asked to fix a gate rate which would have the effect of abrogating the contract divisions. This court said:

> "There is no claim that the rates to consumers were involved by these contracts, nor does it appear that the public interest was involved in the action which the Commission was asked to take."

The exact opposite to this situation is presented in this case. It is the rates to the consumers which is sought to be regulated, not only were the rates to the smelting companies (which were fixed in the contracts), but the rates to the domestic consumers at South Fort Smith and domestic consumers in the Kibler field, and commercial, domestic and industrial rates in the cities of Fort Smith and Van Buren, were the subject of the action by the Commission.

The Court further pointed out in the Arkansas Natural Gas Company case that while a state may exercise its legislative power to regulate public utilities and fix rates, notwithstanding that its effect might be to modify or abrogate private contracts, yet it stated there was no principle which imposed an obligation to do so merely to relieve the contracting parties from the burdens of an improvident undertaking. That the power to fix rates, when exerted, is for the public welfare, to which private contracts must yield, and that it is the intervention of the public interest which justified, and, at the same time, conditions its exercise.

The public interest was involved here, not only in the rates themselves to the consumers, but in the contracts preventing competition in the gas field; and the destruction of a public service corporation through preferential and inadequate rates; and which preferences prevented other industries similarly situated and in the same class as the contracting parties, from having an opportunity to obtain gas from this public pipe line corporation.

The question of classification there decided has no bearing on any issue raised here.

The Georgia case decided these points: First, that there was a valid contract between the town of Decatur and the street car company, and in so deciding this court followed the decisions of the Supreme Court of Georgia to that effect, and further stated that in deciding the Constitutional question this court would determine for itself whether there was in fact a contract, and if so, the extent of its binding obligation, but would lean to an agreement with the state court.

The court next decided, treating the contract as valid, that the statutory extension of the city limits of the town and making the contract rate applicable to the added territory was an impairment of the obligation of the contract to the extent of the added territory. Certainly there is no such issue presented here.

The next point decided was this: The Georgia statute extending the power of the Railway Commission to street car companies, contained a proviso to the effect that it should not be construed "To impair any valid, subsisting contract now in existence between any municipality and any such company."

It was insisted that this proviso brought about an arbitrary classification, in violation of the equal protection clause of the 14th Amendment, but this court on the authority of the Arkansas Natural Gas Company case held that this was not an arbitrary classification. Certainly no such issue is presented here.

The other points decided in that case did not even remotely touch upon any issues here presented.

The order of the Commission, from which this appeal is taken (R. 138), shows that a comprehensive study of the question was made and that the rights of the public were protected. It recites that there had been an investigation by the Commission and public hearings in the cities of Fort Smith and Little Rock; that the Commission made a report of the condition of the Clear Creek Oil & Gas Company's properties and that the rates the contracts allowed the Clear Creek Oil & Gas Company were unreasonable, unjust and discriminatory.

The order then provided that the Clear Creek Oil & Gas Company should be required to withdraw from the files of the Commission its Arkansas Corporation Commission Tariff No. 2 and be permitted to file as its No. 2 a rate schedule as follows:

> For domestic gas for Fort Smith and vicinity, 25 cents per thousand cubic feet.
>
> For domestic gas for Kibler field, 15 cents per thousand cubic feet.
>
> For power and industrial gas; First 300 M. Cu. Ft. 15 cents per M.; next 300 M. Cu. Ft., 13 cents per M.; next 300 M. Cu. Ft., 10 cents per M.; all over 3000 M. Cu. Ft., 8 cents per M. Cu. Ft. (This was changed by supplementary order two days later to 9 cents per M. Cu. Ft.)

The second paragraph provided that the increase in rates therein authorized should go into effect on the first day of July, 1920, and remain in effect for thirteen months unless otherwise ordered by the Corporation Commission, thus showing that the public rights were protected and that the Commission retained control of the matter of fixing rates.

The order further required that the Gas Company be required to keep a full and accurate account of the revenues and expenses of its operation and file same with the Commission at the expiration of one year after July 1st, 1920, which report should be in addition to any other report required by law. The Commission retained jurisdiction of the parties and the subject matter of the case to continue, change or modify the rates of the Gas Company at any time.

In view of the facts, which we have heretofore shown led up to the entry of this order, we call the Court's attention to the comprehensive scope of the order as demonstrating that the interest of the public was involved.

THERE IS NO IMPAIRMENT OF CONTRACT

We have heretofore quoted the section of the Corporation Commission Act under which this proceeding was had and there is no contention that it is not broad enough to clothe the Commission with the power which it exercised, and the

Supreme Court has affirmed its ruling in full, and therefore, the construction placed upon the Act sustained the petition, and necessarily then the only question here is whether the Act thus construed impairs any Federal right.

The fact that this Act was passed after the contract was made does not impair the obligation of the contract with a Public Service Corporation. This principle was thus stated in Producers Transportation Co. vs Railroad Com., 251 U. S. 228, as follows:

> "That some of the contracts before mentioned were entered into before the statute was adopted or the order made is not material. A common carrier cannot, by making contracts for future transportation, or by mortgaging its property or pledging its income, prevent or postpone the exertion by the state of the power to regulate the carrier's rates and practices. Nor does the contract clause of the Constitution interpose any obstacle to the exertion of that power," citing authorities.

This was not a new principle announced in this case. This Court had in Armour Packing Co., vs U. S. 209 U. S. 56, decided on different facts there before it exactly the same principle.

The Supreme Court of Pennsylvania in Leiper vs Baltimore & Phil. Ry. Co., 262 Pa. State 328, applied the principle of the Armour Packing Company case to exactly a similar situation in Pennsylvania to the one here. Leiper had succeeded to a contract between Lewis and the Balt. & Ohio Ry., which contract had passed to the Balt. & Phil. Ry. Co.

The contract provided that the railroad company was to transport in cars to be furnished by it, stone from a quarry to certain points on its line at 40 cents per ton, and other rates therein mentioned.

This contract was continued in operation from the time of its making to the decision in the case. Pennsylvania enacted a Public Service Law similar to the Arkansas Corporation Commission Act, and the Public Service Commission fixed higher rates than the contract rates for the stone

from this quarry, and it was contended that the obligation of the contract had been impaired.

The Court quoted from the Armour Packing Company case and held that the principle there announced was applicable to such situation.

In city of Camden vs Arkansas Light & Power Co. 145 Ark. 205, the Supreme Court of Arkansas sustained the Corporation Commission Act of 1919 against an attack by the City of Camden, which alleged that the surrender of the franchises which contained contractual rates was an impairment of the obligation of the contract. The Supreme Court carefully reviewed not only the decisions of this court which were controlling on that subject, but reviewed the decisions of many state courts which had also passed upon the question and found that both in the state and federal courts the law was thus declared:

> "There are many other authorities confirming the doctrine that to regulate or alter rates charged, or to be charged, by public utilities, is an inherent attribute of police power or sovereignty existing in the State, which may be exercised at any time through any State agency for the purpose of establishing just, equitable and reasonable rates under such circumstances as may exist at the time. It is seemingly an attribute of sovereignty which can not be contracted away, and in contemplation of which all contracts or agreements must be made," citing many authorities.

It is sought to make a distinction between suits between the public as a whole and public service corporations, and suits between a public service corporation and private individuals, but there is no distinction in principle whatever in the form in which the litigation may arise. In fact, many of the leading cases on the subject arose just as this one did, as a suit between the public service corporation and the individual holding under the contract, among them are Union Dry Goods Co. vs Georgia Pub. Serv. Corp., 248 U. S. 372; Leiper vs. Baltimore & Phil. Ry. Co., 262 Pa. St., 328.

The authorities seem uniform to the effect that there is no difference in principle between regulation of rates between municipalities and public service corporations and

between public service corporations and private individuals. This exact question was so decided in the following cases: Kansas City Bolt & Nut Co. vs Kansas City Light & Power Co., 275 Mo. 529; Ohio & C. Smelting & Refining Co. vs Pub. Utility Commission of Colorado, 197 Pac. Rep. 1082; Leiper vs Balt. & Phil. Ry. Co., 262 Pa. St. 328; 105 Atlantic Rep. 551.

The Spelter Company's real grievance here is not that its contract was impaired by the Corporation Commission Act or the order made by the Corporation Commission thereafter sustained by the Supreme Court, but that the Supreme Court erred in finding as a fact that the Gas Company was a public service corporation at the time it entered into the contract with the Spelter Company. The rub of the case is on the construction of the Act of 1905 applied to the facts of the instant case.

This contract was made in 1916 and it is clear that a contract made after a statute is enacted cannot be impaired by that statute. Levy Leasing Co. vs Siegel, 258 U. S. at p. 249.

It is equally true that a judicial construction placed upon a statute existing prior to a contract, although the judicial decision is subsequent to the contract, is not an impairment of the contract. Brown vs Smart, 145 U. S. 454; Ross vs Oregon, 227 U. S. 150; Columbia Ry. Gas & E. Co. vs South Carolina, 261 U. S. 236.

We have heretofore reviewed the facts demonstrating as we believe that the decision of the Supreme Court of Arkansas could not have been otherwise than as it was under the evidence, and there is no assignment of error that that decision was without evidence to support it, and necessarily the subsequent order regulating the rates of the public service corporation is not an impairment of the obligation of a contract.

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FORT SMITH SPELTER COMPANY *v.* CLEAR CREEK OIL & GAS COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 266. Submitted January 28, 1925.—Decided March 2, 1925.

Where a private gas company, empowered to become a public service corporation, changed its status accordingly and exercised the power of eminent domain soon after it had contracted to furnish future supplies of gas to a consumer, and the face of the contract, and attendant circumstances, showed that this change was in contemplation when the contract was made, *held* that an order of a state commission allowing the company increased rates was not an unconstitutional impairment of the contract. P. 232.

161 Arkansas 12, affirmed.

ERROR to a judgment of the Supreme Court of Arkansas which sustained an order of the State Corporation Commission allowing the defendant in error gas company to increase its rates. See 161 Ark. 12; 153 *Id.* 170; 148 *Id.* 260.

Mr. Tom M. Mehaffy, Mr. James W. Mehaffy and *Mr. James S. Holt* for plaintiff in error.

Mr. Joseph M. Hill and *Mr. Henry L. Fitzhugh* for defendant in error. *Mr. Thomas B. Pryor* and *Mr. Vincent M. Miles* were also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The Clear Creek Oil & Gas Company, a corporation of Arkansas, petitioned the Corporation Commission of the State for an increase of rates for gas used by smelters and the like. The Fort Smith Spelter Company objected on the ground that it received the gas under a private contract made by the Gas Company, when it was a private corporation, with two men to whose rights the Spelter Company had succeeded; and that therefore the contract was not subject to the modification asked. The Commission increased the rate and after intermediate proceedings the order of the Commission was affirmed by the Supreme Court of the State. 161 Ark. 12; s. c. 153 Ark. 170; 148 Ark. 260. The case is brought here by writ of error on the ground that the order is a law impairing the obligation of contracts. *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 318.

The Supreme Court decided that the Gas Company had power under the laws of the State to become a public service corporation but was not bound to do so. Soon after the contract in question was made the Gas Company did become such a corporation and as such exercised the power of eminent domain. The Supreme Court held that if the contract was made when the Company had not yet devoted itself to the public service still the instrument on its face and also the circumstances showed that public service on the part of the Company was contemplated with the consequence that the Company and all its contracts would become subject to public regulation. We see no sufficient reason for disturbing this finding. As was said below, the fact that the gas was to be delivered at Fort Smith, eighteen to twenty miles from the gas field specified in the agreement, showed that a pipe line would be necessary, which in the ordinary course of events would require the exercise of eminent domain. The gas field

was large and additions were agreed for. The contractors were entitled to call for one hundred and fifty million cubic feet of gas for each thirty days, with a possible extension up to three hundred million. They were given the 'first call' upon the Company's gas supplies and it was agreed that if the Company should sell gas to consumers, except churches, schools, hospitals, or charitable institutions, at a rate less than that fixed by the contract there should be a corresponding reduction. Everything in short pointed to a very extensive enterprise which hardly would be possible without the power incident to this public service under the laws of the State. It would be most unusual, as all know, for such a Company to attempt to work in any other way. It already had franchises in several towns and cities to supply gas.

Judgment affirmed.